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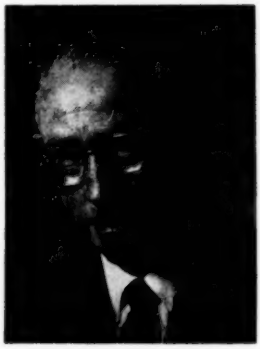
PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page



THE JOURNAL'S BIRTHDAY: This is the first issue of Vol. XXV of The Journal. In casting about for appropriate comment on this Silver Anniversary I found that it was difficult to say anything about this truly great publication without repeating that which has already been said. The Journal is a living monument to this Association, and to the men who have made it possible. Of these, of course, George Yancey stands as a justifiedly proud "father". He was Editor-in-Chief from the publication of Vol. I, pg. I, in April, 1934, (at which time he was President of the Association) to July of 1955, when he became Editor Emeritus. It would be impossible for me to add lustre or glory to the accolades already won by George Yancey for this accomplishment. His activities have been fittingly described by Past President Lester Dodd in his presidential message on page 258 of the July, 1955 Journal. Fortunate we are, indeed, to still have an "Emeritus" to whom we may look for counsel.

The Journal has entered a new era. The four quarterly issues which now make that our yearly volume constitute just that—a volume. From the twenty pages of the first issue to the 450 pages of Volume XXIV, the steady and healthy growth has been one of quality as well as quantity. In the research of the law on any problem which may face us as insurance attorneys, be it old and well worn research merely made to refresh one's memory, or be it new and untried, the point of best original source is The Journal.

Under the careful guidance of Bill Knepper as Editor, and with the assistance afforded him by the Chairman and members of The Journal Committee, our journalistic stature continues to grow. However, as I have noted by reading the comments of a number of my predecessors, the membership must be continuously reminded that it is of the utmost importance that cooperation be given the editorial staff. I now urge that you not pass an opportunity either to write an article yourself, have it written, or call the material or case law to the attention of your state editor.

There are some interesting things in the Journals of the past—too many indeed to be accounted for in detail. The temptation to recite some of them is irresistible. How many of you of late have looked at the picture of the Executive Committee appearing on page 2 of Issue No. 1, Vol. 1? You may not find more than two with whom you are personally familiar. You probably would find more familiar faces in the picture which appears just inside the cover of Issue No. 4, Vol. VI, (October, 1939).

From time to time the question arises: When, where and how the Association originated. The ancient history on this subject is succinctly outlined by the Editor on page 4 of Issue No. 1, Vol. VII, January, 1940. This recitation is amplified during the first part of the President's Report by Wayne Stichter, in July, 1951, (Issue No. 3, Vol. XVIII), and was brought down to date for us by John Kluwin in his President's Report of last year (Issue No. 4, Vol. XXIV). To better know your Association, I suggest you again read these articles. Many indeed are the fond memories brought to new flame in checking my Journals in preparation for this "Page."

Let us turn from the past! The work, the labor, and the success of Editor Knepper, Paul Ahlers, the former chairman, and Gordon Snow, the present chairman of The Journal Committee, and of all of the State and Regional Editors, is too well known to need further heralding, but they would not forgive me if I did not reiterate to you the fact that The Journal is *your* publication; its ultimate success depends upon the energetic, industrious, loyal, untiring and continuous support of every member of the Association.

THE MID-WINTER MEETING: The Midwinter Meeting will be held at Santa Barbara, California, at the Santa Barbara Biltmore, from February 9 to February 14. To any of you who may harbor the thought that something is being done which should be changed, or that there is inaction where there should be action, or if anyone has anything to offer for the general good of the Association, now is the time! The Executive Committee will not convene again until just before the annual convention at the Greenbrier.

The Midwinter Meeting, under present hotel conditions, must be limited in number. However, it is being held so "Far West" that it may be that some members who have been invited will not all be able to attend. No promise of accommodations can be made, but if, upon receipt of your Journal, you feel the urge to see the Pacific Coast, kindly inquire, and if accommodations are available, you shall be welcomed.

ANNUAL CONVENTION RESERVATIONS: The announcement concerning reservations for the Annual Convention at the Greenbrier, White Sulphur Springs, West Virginia, is now, or soon will be, in your hands. This is to urge upon you two things! First, if you intend going, make your reservations immediately. Second, if you make those reservations and AT ANY TIME THEREAFTER your attendance becomes impossible for any reason, notify the management of The Greenbrier and our Executive Secretary *immediately*.

* * * * * *

The good year 1958 is at hand as this is written, and it is my pleasure, each and every day, to wish to one and all of you Health and Happiness, and all of the Joys that go with them throughout every day of the Year—and always.

FORREST A. BETTS
President

CURRENT DECISIONS

Recent decisions of the courts dealing with insurance and negligence law and practice are included in these pages. Journal readers are asked to send in digests of such rulings. Unreported cases dealing with novel questions are especially desired. Members of I.A.I.C. should submit their contributions to their State Editors.

NEW TRIAL– JUDGMENT OBTAINED BY PERJURY –DISCRETION OF TRIAL COURT

After the recovery of a judgment for $12,500.00 in an F. E. L. A. case, on the basis of an alleged injury manifested by a jerking or twisting of the head, medically described as a "spasmodic torticollis" the plaintiff appeared to recover and motion pictures showed that his twisting and jerking had ceased. A motion for a new trial was sought under Rule 60 (b), Federal Rules of Civil Procedure, on the grounds that the judgment had been obtained by fraud, misrepresentation and other misconduct. The trial court denied the motion. On appeal, although recognizing that the motion pictures raised "grave suspicion of the legitimacy of plaintiff's complaint" the court of appeals refused to disturb the judgment. It said that this motion was "directed to the sound discretion of the trial court" and that in order to justify granting such a motion there must "be clear and convincing evidence of fraud" which "must be such as prevented the losing party from fully and fairly presenting his case or defense". The reviewing court also said that on this record, if the trial judge had determined that fraud or other misconduct existed, the reviewing court would not have disturbed that conclusion. *Atchison, Topeka and Santa Fe Railway Co., v. Barrett*, 9 Cir., 1957, 246 F. 2d 846.

ALLERGIC CONSUMER– ENTITLED TO WARNING

Although defendant's proof showed that it had sold over 82 million jars of deodorant cream over a four year period and had received only 373 complaints of skin irritation allegedly caused by the product, nevertheless, the court, applying Massachusetts law, held that it was for the jury to determine whether, in the exercise of reasonable precaution, the defendant could have foreseen that at least some of the potential users of the product would suffer serious injury from such use and whether the defendant had a duty to warn those users of that possible injury, pointing out that the manufacturer's standard of care may well include a duty to warn those few persons who it knows cannot apply its product without serious injury. Furthermore, the liability in negligence for the failure to discharge such duty by attaching an appropriate label containing adequate words of caution is recognized as one of the costs of producing and selling a commodity for use by members of the public whose knowledge of potential danger to themselves may be greatly inferior to that possessed by the manufacturer. In the circumstances of the case, plaintiff's continuance in the use of the deodorant cream after having previously contracted a rash from it cannot, as a matter of law, be considered either contributory negligence or assumption of risk on her part, these defenses being inapplicable when the manufacturer's breach of duty is based upon a failure to warn. *Wright v. Carter Products, Inc.*, 244 F. 2d 53, 2 Cir., 1957. (Contributed by Charles Bachmann, Boston, Massachusetts).

EXCLUSIVENESS OF REMEDY– STATE COMPENSATION LAWS V. LONGSHOREMEN AND HARBOR WORKERS' ACT

In 1956, the Louisiana First Circuit Court of Appeals held that a seaman could choose his remedy as between the Jones Act and the state compensation act, provided only that "no material prejudice is worked to any feature of the general maritime law". *Beadle v. Massachusetts Bonding and Insurance Company*, 87 So. 2d 339 (Louisiana).

Now the same court in *Richard v. Lake Charles Stevedores*, 95 So. 2d 830 (Louisi-

ana), has extended its holding to allow an overlapping of the state compensation law and the Longshoremen and Harbor Workers' Act. A worker, admittedly employed as a "longshoreman", was injured in the hold of a vessel on navigable waters at Lake Charles, Louisiana. The district court dismissed the complaint on exceptions or demurrers, holding that the federal government, through the Longshoremen and Harbor Workers' Act, had preempted the field to the exclusion of state law.

Citing, as in the *Beadle* case, the United States Supreme Court decision in *Davis v. Department of Labor*, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246, the appellate court found that concurrent jurisdiction exists as between state and federal tribunals, "each jurisdiction deciding for itself whether it shall apply its own law, such determination being relatively final".

The Louisiana court rejected the "artificial barrier" of the "Jensen Doctrine" and reversed the lower court, remanding the case with instructions to proceed under the provisions of the Louisiana Workmen's Compensation Act.

POLICY COVERAGE—LIABILITY ASSUMED BY AGREEMENT

Under Indiana law, a father who signs his minor (under 18) son's application for a driver's license thereby agrees to be responsible, jointly and severally with the applicant, for any injury or damage caused by the applicant by reason of the operation of a motor vehicle. The Court of Appeals for the Seventh Circuit holds that in signing such an application the father makes an agreement to assume liability, which is excluded by the automobile liability policy; accordingly, that the insurer does not provide coverage. *Buckeye Union Casualty Co. v. Bell*, No. 12063, decided October 31, 1957. (Contributed by John A. Kluwin, Milwaukee, Wisconsin.)

SETTLEMENT NEGOTIATIONS—PAYMENT BY THE INSURED

"An insurance company which negotiates with those making claims against its insured to ascertain the amount of their claims and whether acceptable compromise settlements can be arrived at, does not thereby foreclose itself from questioning those claims or its liability to pay them as between it and its assured. This would seem to be true whether the negotiations are carried on directly or through the insured, providing that there is no assumption of liability going beyond this and no facts making it inequitable for the insurer thereafter to deny liability. * * * But this does not authorize the assured to make payment of the claims under investigation and thus to bind the insurer in the absence of authorization. Settlement by an assured, without the previous consent of the insurer, ordinarily releases the insured." Christenson, D. J., in *Freed, et al., v. Inland Empire Insurance Co.*, No. C-157-55, U. S. District Court, District of Utah, Central Division, decided September 25, 1957.

BREACH OF WARRANTY—PRIVITY NECESSARY

Where plaintiff's husband had purchased an electric cooker from a retailer, the cooker exploded, and the plaintiff was injured, the retailer was held not liable in a suit based not on negligence but on breach of warranty. The Ohio Supreme Court held that there was no privity and hence no implied warranty. "An implied contract of warranty requires a meeting of the minds the same as does an express contract." *Welsh v. Ledyard*, 167 Ohio St., 57, ——N. E. 2d ——, decided November 27, 1957.

EMPLOYER'S LIABILITY—EXCLUSIVE REMEDY DEFENSE—AGGRAVATION OF A NON-OCCUPATIONAL DISEASE OR CONDITION

By the great weight of authority throughout the country, it has been held that workmen's compensation acts do not constitute an exclusive remedy against an employer barring an action at common law by the employee where the injury is not compensable under said acts. See Larson—Vol. 2—*Workmen's Compensation Law* 135, 100 A.L.R. 519, 121 A.L.R. 1143. Thus, in most jurisdictions, if an employee sustains an injury in his work which is deemed not to be accidental in nature, or if he sustains an accidental injury which does not arise out of and in the course of his employment, then the injury is not compensable; and, under the circum-

stances, the employee would be entitled to maintain a common law action against his employer for the injury if he is able to establish negligence on the part of said employer.

The decision in *Union Carbide Corp. v. Stapelton* (6th Cir., 1956) 237 F. 2d 229, demonstrates another method by which an employer may be exposed to common law liability to an employee for the negligent aggravation of a non-occupational disease or condition. In *Union Carbide* the employee worked from 1944 to February 1953. During this time, he was required to submit to regular periodic physical examinations by physicians and nurses who were hired on a full-time basis in the employer's medical department. During the period, the employee received fourteen X-rays of his chest and lungs as a result of the periodic examinations, and these X-rays were interpreted by the medical department staff as indicating that the employee was suffering from an arrested case of pulmonary tuberculosis. These interpretations and findings were entered in the employee's medical records kept by the employer.

One of the doctors in the medical department testified that she advised the employee in 1944 that he had an arrested tubercular condition, and that she advised him of what symptoms would indicate that his condition might be deteriorating, in which event he should immediately contact his own doctor or come back to the medical department. She testified further that she had had repeated discussions of this nature with the employee between 1944 and 1952. However, there were no entries in the medical department records to coroborate the testimony to the effect that the employee had been apprised continually of his tubercular condition. The employee denied that he had ever been advised by anyone in the employ of the employer that he had a tubercular condition. The employee last worked for the employer on February 12, 1953, and went home due to illness. He consulted a private physician, and, on April 10, 1953, an X-ray examination disclosed that he was suffering from active pulmonary tuberculosis. He was admitted into a hospital and remained there up to the time of trial, totally and permanently disabled by his tubercular condition.

The common law action against the employer was grounded upon the negligence of the employer in failing to disclose to the employee that he was suffering from tuberculosis, and the employer defended on the ground that the employee had been completely informed that he was suffering from an arrested tuberculosis. The court held that the evidence was sufficient to warrant a finding that the employer's physician never informed the employee of his condition during the entire period of his employment, that he learned of it for the first time in April, 1953, and that the failure to inform the employee of his condition was the proximate cause of his total disabiilty. The court went on to point out that the failure of the employer to disclose to the employee what its records showed his condition to be was clearly a violation of its duty to exercise ordinary care for his safety.

The decision in *Union Carbide* presents a real problem in the situation where an employee is disabled in his employment by a disease which is deemed to be non-occupational in nature. In such a situation, since the employee will not be entitled to occupational disease benefits, the danger then exists that the employee will attempt to make a common law recovery against the employer on the theory that the employer by its negligence aggravated the underlying condition so as to cause disability. The result obtained in *Union Carbide* may possibly be avoided by having the employer's medical staff make proper entries in the employee's medical record at the time of each periodic medical examination, to establish that the examination disclosed the existence of a non-occupational disease or condition, and that the employee was fully advised of his condition by the physician making the examination.

These records should also disclose what recommendations, if any, were made by the physician with respect to the condition and what the employee's attitude was with respect to these recommendations. (Submitted by Paul W. Fager, Boston, Massachusetts.)

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Admitted since July 6, 1957

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909 State-Planters Bank Building

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The Journal—Quarter of a Century

GEORGE W. YANCEY*
Birmingham, Alabama

THE EARLY history of the Journal is so closely related to the early history of the association, that I feel in this article I should briefly refer to the history of the association, prior to the Journal.

President Edwin Jones, in opening the meeting of the association on September 13, 1928, at the Chamberlain-Vanderbilt Hotel at Old Point Comfort, Virginia, referred to the early history of the association, as follows:

> "This organization was organized in September 1920 at Atlantic City, New Jersey. Membership at that time was limited to General Counsel of accident and health companies. At our Convention held in Toronto, Canada, September, 1927, the name was changed to the International Association of Insurance Counsel, and the clause relating to eligibility of members was amended and broadened so as to take in general counsel of casualty companies, and attorneys representing casualty companies."

Beginning with the year 1928, and extending through 1933, the association, each year, published the proceedings of the annual convention. These Year Books were published under the supervision of the then president.

From 1920 to 1932, inclusive, this association held its annual meeting at the same time and at the same place as the International Claims Association. The International Claims Association was composed of the managers of claim departments of health and accident insurance companies, and home office counsel of health and accident companies.

At the annual meetings of the International Association of Insurance Counsel and the International Claims Association, held at White Sulphur Springs, West Virginia, on September 8, 1932, it was determined by the governing bodies of both of these associations that it would be to the interest of each to discontinue holding their respective meetings at the same time and place each year. This decision and disassociation from the International Claims Association, plus the change in the bylaws of our association which followed, raising the standards and requirements for membership, set our association on the course on which it is today.

At the 1931 meeting of the association the publication of a Journal by the association was discussed. A committee was appointed to study the question. Later the Executive Committee, after hearing the report of the special committee, approved the proposal and authorized the publication of a Journal, under its direction and control. The first two issues of the Journal were edited and published and distributed by the president of the association. In 1934 an editor was elected by the Executive Committee, and the Journal attained a permanent status in the association.

Some of the readers of the Journal no doubt wonder how I happened to be appointed editor of the Journal in 1934. It was very simple. I joined the association in 1927. I was elected a vice-president in 1928. The then president of the association was a close personal friend of mine. He appointed the nominating committee, and was renominated by this committee each year. I was continued as vice-president until in 1932, when, due to the fatal illness of President Jones, I was called upon to arrange for the meeting at White Sulphur, and to preside over the meeting. In compliance with the bylaws, I appointed a nominating committee. The members appreciated the honor, and reciprocated by naming me as president. This procedure continued through 1933, at which time the bylaws were amended limiting the term of the president to one year. By then I was closely identified with the Journal, and was so sold on the association, its possibilities and the possibilities of the Journal, that I readily accepted the editorship of the Journal at the instance of the Executive Committee.

Before dictating this article, I scanned through the issues of the Year Books from

*President, International Association of Insurance Counsel, 1932-1934; Editor, Insurance Counsel Journal, 1934-1955; Editor Emeritus, 1955—; member of the firm of London & Yancey.

1928 to 1933, inclusive, and the early issues of the Journal. I enjoyed refreshing my memory of events which took place in the early formative period of the Journal and of the association, and recalling dear friends who worked with me in behalf of the Journal. I am happy and proud to have been the editor of the Journal for over twenty years, and to have attended every meeting of the association since 1927.

The Journal is unique in that it does not permit its pages to be cluttered by advertising, and in that it depends upon voluntary contributions of the members of the association, and other interested persons, for its copy.

Volume 1, No. 1, of the Insurance Counsel Journal contained only two articles. One was written by Mr. John H. Luhn, vice-president of the Fidelity and Deposit Company of Maryland, entitled, "Penalty of Bond as Limit of Surety's Liability". The other article was written by Mr. W. Calvin Wells, general counsel, Lamar Life Insurance Company, entitled, "The Tragedy of the Efforts of Life Insurance Companies to Provide Benefits in Case of Total and Permanent Disability of Policyholders." These two articles covered five pages of the Journal. The other fifteen pages of this issue of the Journal were devoted to committee reports, lists of committees, etc. You will see from this that the first issue of the Journal was rather modest.

The great value of the Journal, and the high character of the Journal, have been maintained through the years, not only by the efforts of the officers and editor of the Journal, but by the contributions from quarter to quarter each year by members of the association in furnishing the Journal articles, which have often amounted to briefs, on subjects of current interest to trial attorneys and to home office counsel. These articles have kept the Journal vital and worthwhile.

Your able and enthusiastic editor, Bill Knepper, is doing a great job. Regardless of his efforts and talents he must have your continued contribution of articles, of the type which will continue to enhance the value of the Journal. The more you give of your time and talents to the Journal, the more you will appreciate it. Thus you will insure its position as the respected and reliable authority that it has reached today.

THIRTY-FIRST ANNUAL CONVENTION

THE GREENBRIER

WHITE SULPHUR SPRINGS, WEST VIRGINIA

JULY 9, 10, 11 AND 12, 1958

Report of Automobile Insurance Committee—1957*

WALTER ELY, *Chairman*
Los Angeles, California

THROUGH the selfless efforts of two members of your Automobile Insurance Committee, the principal obligation of that committee for the year has been fulfilled. Henry T. Reath of the Philadelphia firm of Duane, Morris & Heckscher prepared an article entitled "Scientific Data and Expert Opinion—Its Use In Automobile Accident Cases". Another work, "The New 'Uninsured Motorist' Endorsement To Family Automobile Policies—The 1960 Look", was prepared by Orrin Miller of the Dallas firm of Robertson, Jackson, Payne, Lancaster & Walker. These papers were published in the April, 1957 issue of the Journal, and because of their excellence, your committee takes reflective pride that it was the agency through which the contributions were made.

The committee was given no assignment other than the general one which brought about the creation of the articles mentioned, but its chairman solicited comments from the committeemen with reference to a general and current problem of automobile insurance, to which, it is believed, the association should not blind itself.

In 1952, Ray Murphy, General Counsel of the Association of Casualty and Surety Companies, delivered to an institute at the Southwestern Legal Foundation in Dallas, Texas, an address entitled, "Observations On The Future of Insurance, Awards And Compensation". Quoting from that address, which has been widely disseminated in pamphlet form, "In 1951 the underwriting losses of capital stock insurance companies were in the neighborhood of $100,000,000 on automobile bodily injury and property damage claims. You may be surprised to learn that .7% represents the 1931-1950 average underwriting profit, before federal income taxes, on all lines written by member companies of the National Bureau of Casualty Underwriters, a rate making organization comprising most of the large stock casualty companies. If we take more recent years, we find the five-year average for 1946 to 1950 developed an underwriting loss of 3.5%." In a recent issue of Time Magazine, in the section devoted to business, it is revealed that the loss trend has continued.

It is believed to be a matter of common knowledge that lay people have resented even slight increase in automobile insurance premiums, and Mr. Murphy recognized the fact, which all trial lawyers know, that resentment among jurors of premium increases may contribute to unjust results in cases wherein the fact that a defendant will be indemnified is known or suspected.

The conclusion seems inescapable that there is a limit beyond which premium rates may not be increased and a limit to the time during which, and the extent to which, automobile insurance companies may operate at losses.

For the sole reason that it was believed by your chairman that the situation as it exists presents the problem most seriously affecting the membership of our association, your chairman invited the committeemen to comment thereon. It may be observed that the invitation was met by more than the usual amount of response from the members of the committee and also that we were favored with comments from responsible executives of individual companies, the general manager of the National Association of Independent Insurers, the general counsel of the American Mutual Alliance, and one of the counsel for the National Bureau of Casualty Underwriters. The latter adopted the address of Mr. Murphy, to which reference has already been made, as representing the viewpoint of his association.

It is wished that every member of our association could be afforded the opportunity to read the replies made to the chairman's invitation for comment since, in general, they represent conscientious and thoughtful consideration of the problem in all of its ramifications. Time and space, as well as limitation on the ability to condense, do not make it possible to report

*EDITOR'S NOTE:
The Report of the Automobile Insurance Committee—1957 was prepared and presented to the Executive Committee prior to the 1957 Convention. Publication of the report has been deferred until this time in order that the report might be studied by the Executive Committee.

truly and adequately the viewpoints expressed, some of which were divergent.

Your committee did not concern itself with any special problems of economics attendant upon the subject matter, although we cannot ignore the effect of the inflationary spiral. It is pointed out in United States Investor, Vol. LXVIII, No. 14, April 6, 1957, that, "On the other hand, a fluid economy, having marked upward tendencies as regards the price level, poses some terrific problems not the least of which is the lag in rating processes which inevitably occurs under such circumstances—the companies all too often finding themselves in the position (as they do today) of collecting their premiums on the basis of a price level existing two years previously and paying out their losses on the basis of the current depreciated purchasing power of the dollar. * * * It all comes down to the fact that the premium rate level simply cannot keep up with the ravages which inflation invokes on the loss-paying activities —even though every effort is made by the managements to get the claims off the books as rapidly as is feasible."

No commentator took issue with the two basic premises, which are, (1) that automobile insurance companies should earn, and must earn, a reasonable profit, and (2) there is a limit beyond which premium rates may not be increased.

While recognizing that there is such a limit as mentioned in the second premise, responsible people seem to agree that this limit has not been reached and perhaps not even approached. In his published address of 1952, the general counsel of the Association of Casualty and Surety Companies pointed out that from 1939 to 1952, the cost of all types of private passenger bodily injury and property damage liability insurance increased only 72.5% in the state of New York, the highest rated territory. In the same period, the nation-wide cost of hospital expenses increased by 135%, auto repair costs by 134%, and the price of new automobiles by 136%. At the date of this writing, 1957, the cost of the Chevrolet automobile is $2540 as against the cost in 1935 of not more than $800. There are now 56,000,000 automobiles on the highways as compared to 30,000,000 in 1940, evidencing the willingness of the public to expend the enormously increased initial cost of the automobile itself. Resentment over the matter of rates by jurors and laymen generally would surely be alleviated to some extent if the automobile insurance industry, as a matter of public relations, pointed out the fact in its advertising program that while general costs attendant upon the operation of an automobile, including the cost of the machine, have increased as indicated during the past few years, an automobile owner may procure adequate protection at a rate vastly less in corresponding rate of price increase. Certainly it will not be contended that insurance protection is less important as an incident to the operation of an automobile than a radio, for example, the cost of which has increased by approximately 200%. The matter of the advisability of educating the public to the fact that it is not paying an exorbitant rate for the security afforded by indemnity insurance is mentioned in this report because the attitude of the public is important from the standpoint of the trial lawyer who undertakes the responsibility of appealing for just results before juries affected by the attitude of public thinking.

It seems to be the feeling of insurance management that, *if left alone*, it will be able to solve the problem of its interests. It has contributed, and still contributes, immeasurably to campaigns for public safety, and for these contributions, our association, and society in general, should forever be indebted.

Several contributors have mentioned the activities of a limited number of unscrupulous attorneys as contributing to the difficulty. None has mentioned the unscrupulous medical witness, but the unscrupulous lawyer would be without an effective weapon were he deprived of this invaluable assistant to his nefarious enterprise. To your chairman, it has seemed that there has been a rather marked weakening of the moral fiber of the community as it bears upon claims for personal injuries. Prosecuting authorities, even judges, ignore demonstrated instances of perjury, and as if they arose out of some kind of a game, they are lightly brushed aside. There seems to be a belief, even among people of otherwise high moral principle, that the word "honesty" has a different and more liberalized meaning in litigation involving claims for personal injuries. Your committee wonders if there is hope for a successful crusade for morality in these cases and a revival of respect for the judicial oath in all types of litigation.

When perjurers in injury claims go unpunished and uncensured, general respect for the judicial processes is lessened. If one branch of litigation must inevitably contaminate the American system of justice as a whole, then it seems that the lawyer's paramount loyalty to country above self interest would compel him to the conclusion that the contaminating branch of litigation should be severed from the courts in the interest of preserving the American scheme of justice. But it appears that the retention of the determination of automobile accident claims in the courts offers the only real hope that honesty and integrity in the presentation of such claims may be encouraged and strengthened. If judges throughout the land would exercise their inherent powers in the treatment of contempt, perjurious testimony and the desire to advance such would receive a generally death-dealing blow.

We have pondered the wisdom of reformation leading to the determination of automobile injury claims in administrative proceedings, and it is believed by those most familiar with the respective procedures that the manner of determination by administrative bodies is generally unsatisfactory, if justice demands, not speedy determination alone, but careful and unhurried exploration for the truth. Furthermore, if we are concerned with morality, as we ought to be, we fear that the tendency to exaggeration of injury claims would be encouraged if their presentation were to comparatively informal bodies unable to command the respect entertained for the courts.

Correspondence from insurance executives has lead your chairman to believe that the occasional enormous verdicts in cases wherein the injuries must, of necessity, be of an obvious and gross nature do not bring the concern that is created by the combined effect of the vastly more numerous instances, wherein comparatively small, and yet unjustly high, verdicts are obtained and the validity of the claimed injuries is doubtful. If these are the cases which trouble insurance management, its problem would inevitably be worsened by the adoption of the administrative type of determination.

Of late, there have been many persons who have advocated the abolition of jury trial and the concept of negligence in compensating those who have received injuries in automobile accident cases. (See article entitled "The Future of the Trial Lawyer", by David W. Peck, August, 1956, issue of the Journal of the American Judicature Society). It can hardly be thought that judges too weak in their sense of responsibility to enforce upon litigants and witnesses the obligation for truthful testimony would apply more integrity and strength in the determination of an injury claim than a jury; however, since such suggestion has been advanced by no less a person than a judge of a New York court, we have felt obliged to note it. The implementation of this innovation would not truly be "reform". It would involve the abolition of a constitutional guaranty which has been held sacred and thus, in the interest of posterity, calls for a long-range consideration of whether or not the elimination of the check of the jury system upon unbridled authority would, in the end, threaten the American way of life as we know it.

We have given thought to other movements which may be ultimately harmful to the automobile insurance industry and the public as a whole. These include efforts to embrace the doctrine of comparative negligence into common law actions for personal injury. So much has been written about this plan and the objections to it are so well known that we will say only that its general nation-wide adoption would be only a step leading to an eventual automobile compensation plan based upon a doctrine of liability without fault, limiting recoveries to relatively small amounts even in individual instances of catastrophic injury, and eliminating courts and lawyers as influential agencies in the adjudication of the recoveries. (See "A Trial Lawyer Looks at Comparative Negligence", Ralph C. Body, April, 1957 issue of the Insurance Counsel Journal).

It has been suggested that the legal profession, in the interest of preserving respect for its own integrity, should give critical examination to the contingent fee contract in injury claims. With the lawyer who truly has the interests of his injured client at heart, such a contract is not open to criticism. Its injustice is made apparent only in those claims which prove to be very substantial and wherein the selfish lawyer insists upon holding his crippled client to the terms of the contract even though the recovery may have been accomplished with only a small amount of time and effort expended by the lawyer. It seems clear, for example, that in a case

which is compromised shortly after the institution of an action for $100,000, the retention by an attorney of one-third of the recovery, or over, is terribly unfair, not only to his disabled client whose injuries warrant such a recovery, but to the general automobile operating public upon whom a part of the loss, at least, is finally put. The query arises as to whether or not a general requirement for court approval of attorney's fees in cases wherein the recovery in an individual claim exceeds $20,000 would inure to the public's benefit.

To a limited, yet authoritative group of automobile insurance company executives went the question of whether the industry would be receptive to some program of subsidization to assure it of even a bare profit in disastrous years. The insurance industry has been among the foremost in its championing of an untrammeled business scheme of competitive free enterprise and, to their everlasting credit, its spokesmen seem to resent the suggestion that there should be further encroachment upon the democratic way of doing business. Three of those who favored your chairman with their viewpoints protested the mention of a subsidy for insurance companies in this report. To others, it is believed that respect for the industry should be enhanced by the revelation herein of its unshaken belief that, with the aid of an enlightened public, it will solve its problems in freedom's way and in rejecting handouts to itself which it has opposed to others, will afford a shining example of steadfast resistance to socialistic influences.

In summary, your committee concludes:

1. The automobile insurance industry contributes vitally to the sense of security enjoyed by every American.

2. It is to the public's interest that the industry receive fair and adequate rates for the service and protection it affords.

3. The industry as a whole has not been earning the profit to which it is reasonably entitled.

4. Its rates in some localities are too low, not having kept abreast of the increases in other costs attendant upon automobile operation.

5. The public in general is unaware of the disproportionately low cost of automobile insurance, and steps to dispel this unawareness, by advertisement and otherwise, could produce advantageous results.

6. The industry's position has been, and will be, improved by highway safety campaigns, strict enforcement of traffic regulations, and careful insistance upon automobile operators' licensing requirements.

7. The legal profession should work in combination with the medical profession to the end that the unscrupulous lawyer and the unscrupulous medical witness be eliminated.

8. The legal profession should strive for the selection of judges with sufficient earnestness of purpose and strength of character to discourage forcefully the advancement of perjurious testimony in their courts.

9. The automobile insurance buying public should be made aware of the effect of unjustified verdicts upon their own financial welfare.

10. The contingent fee contract in injury claims, if oppressive, thwarts reasonable compromise, promotes court congestion, is unfair to the injured person and to the public, and brings down criticism upon the legal fraternity at large.

11. The doctrine of comparative negligence is a step toward a compensation plan based upon a doctrine of liability without fault, and its general adaptation into common law actions in automobile injury cases is opposed.

12. The insurance industry, as do its lawyers, has confidence in the judicial system as it now exists and believes that it will be able to solve its own financial problem by maintaining integrity within itself in the handling of claims and promoting enlightenment of public opinion and understanding.

Respectfully submitted,

Walter Ely, *Chairman;* J. Ralph Dykes, *Vice-Chairman;* F. Carter Johnson, Jr., *Ex-Officio;* Henry L. Anderson, Ari M. Be-Gole, Marshall H. Francis, Harry T. Gray, William B. Mangin, Orrin Miller, Wilbert McInerney, John F. Power, J. Lee Purcell, Henry T. Reath, Donald J. Van Alsburg, Thomas B. Whaley, Marvin Williams, Jr.

Ben E. Salinsky, Richard P. Tinkham and John C. Wickhem do not concur in the expression of disapproval as to results to be anticipated in administrative bodies, feeling that in their own state of Wisconsin the Industrial Commission has performed "very fairly and efficiently." Also they disagree with Conclusion No. 11 of the report and John C. Wickhem has separately stated that he "would greatly have preferred that Conclusion No. 8 be omitted."

From the EDITOR'S NOTEBOOK

In this column, from time to time, the Editor will publish news and views that he believes may be of more than passing interest to the readers of the Journal. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed. Contributions to this column will be welcomed.

OUR READERS will find some "face-lifting" in this 25th Anniversary Issue of our Journal. With the cooperation of The Birmingham Publishing Company, our publishers, we have obtained some new headings for our features, and we have also made some revisions in the make-up of the President's Page and the page listing our Officers and Executive Committee. These changes, and some revisions in styles of type, are calculated to improve the readability of the Journal.

IMPROPER use of discovery was prevented in a recent federal court case in Ohio wherein the plaintiff sought to utilize federal procedure to obtain information wanted for preparation of a similar case pending in the state court. In a state court suit for wrongful arrest and false imprisonment, the plaintiff filed a motion to require the defendant to permit the inspection and copying of certain documents. The motion was overruled on the ground that under the state law the designated documents were privileged.

Thereafter, plaintiff filed a similar suit in the federal court and submitted 59 interrogatories. The court found that the purpose of the interrogatories was to obtain assistance in the preparation of the state court case. A protective order under Federal Rule 30(b) was granted, McNamee, D. J., saying:

> "A citizen of another state has the undoubted right to institute actions against a citizen of this state in either the federal court or in a state court or in both courts upon the same cause of action. But a plaintiff has no right to use a federal court as a mere auxiliary forum through which to obtain assistance in the preparation of a similar case pending in the state court."

The case is *Beard v. New York Central Rd. Co.*, D.C.N.D.Ohio, E.D., 20 F.R.D. 607, decided March 19, 1957.

A WELL written book, chiefly devoted to the making, validity, and enforcement of insurance contracts is the second edition of "Essentials of Insurance Law" by Professor Edwin W. Patterson, of Columbia University, published by McGraw-Hill Book Company, Inc. Professor Patterson, a former Deputy Superintendent of Insurance of New York, published the first edition of his work in 1935. In the preface to the second edition he says, "The aim of the present volume is to present a readable summary of the most important doctrines of insurance law, using but little technical language and relating it wherever possible to the principles and practices of the insurance business." While the publishers say that this second edition is addressed primarily to people in the insurance business and their clients, employees of insurance companies, agents and brokers, and insurance managers, it has much in it of real value to the lawyer engaged in the representation of insurance companies and he will find it a worthwhile handbook.

A PROBLEM that is being discussed in many quarters has to do with the unsatisfactory investigation files that are being handed to trial lawyers by some company adjusters and independent agencies. That this is no new problem is made plain by the following statements appearing in an article by Remington Rogers, of

Tulsa, Oklahoma, published in the January, 1935, issue of the Journal. He said:

> "Too often, when the file, turned over to the lawyer for defense, reveals a slovenly, careless investigation, the lawyer feels it unprofessional, or at least improper, to give damning criticism of the work of another representative of the company which it deserves. Even a suggestion of such criticism may be construed at the home office as the lawyer's attempt to establish an alibi for his own failure if the case is subsequently lost. In consequence, the lawyer accepts his handicap in silence and year after year, * * * the golden opportunity for uncovering the facts which are controlling in court, is lost, the lawyer labors under every possible handicap, the courts are criticized as prejudiced against the companies, and the actual truth is never discovered by the claims superintendent."

Recognizing that it may not be economical to make complete investigations of all claims, the fact remains that in too many serious cases the files handed to the trial lawyer show that "slovenly, careless investigation" of which Mr. Rogers spoke. Witnesses shown on police reports have not been interviewed, the neighborhood has not been canvassed, pictures have not been taken at the scene or of the vehicles involved, medical reports are missing, special damages have not been verified, and so on.

In some instances, the stated excuse is that the adjuster did not consider the case to be one of liability. Occasionally, it is suggested that the case is "so bad" that nothing can be done about it. Generally, however, the reason is neglect, probably resulting from the volume of business in the adjuster's office.

It is expensive for the trial lawyer to be compelled to complete the investigation after the case has been referred to him. Moreover, when he receives the file, usually many months after the accident, the trail is cold.

Such situations, fortunately, are the exception rather than the rule, but—even so—they happen too often.

REPRINTS of the Open Forum on Medico-Legal Jurisprudence and the article, "Can Courts, Juries and Cars Coexist?", by Stanley C. Morris and James D. Ghiardi—both of which appeared in our October, 1957 issue—may be obtained from Miss Dahinden, our Executive Secretary. The price is 50 cents per copy. The available quantities are limited.

FROM John L. Barton, of Omaha, state editor for Nebraska, we learn of a recent decision of the Supreme Court of Nebraska holding inadmissible in evidence hospital records containing opinions of nurses as to pain and suffering of the patient. The case is *Anderson v. Evans,* 164 Neb. 599, 83 N.W. 2d 59, wherein the court says:

> "Voluminous hospital records from the Nebraska Methodist Hospital in Omaha, Nebraska, were admitted in evidence over objections of the defendants. Among these were notes purportedly made by nurses. Approximately ten pages from these notes covering a period from August 7, 1953, to August 18, 1953, were read to the jury. Apparently there was much more of this character of evidence which the jury was probably permitted to take to the jury room.
>
> "The only foundation for the receipt of these notes in evidence was laid by the then assistant medical record librarian of the hospital. She testified that they were the normal, regular business records maintained by the hospital concerning plaintiff; that after proper service to the patient they were assembled in the record office; that her office only assembled the records; that they are compiled on the floors and do not come to the record office until the patient is dismissed; and that they were kept in the ordinary course of business. There is nothing whatever in the testimony of the witness to identify the person or persons who made the notes or to verify their authenticity."

The plaintiff contended that those notes were admissible under the Uniform Business Records as Evidence Act, but the court thought otherwise saying that even assuming that the notes could be regarded as business records, "the foundation for admission in evidence required by the terms of the statute was never laid".

INTERESTING READING*

EXAMINING JURORS AS TO INTEREST IN INSURANCE COMPANIES

Jacobson v. Coady, S.D., 84 N.W.2d I.

At the outset of an automobile case and outside the presence of the jury, defense counsel stated that defendant was insured against liability by a stock insurance company. Counsel then requested that plaintiff first ask the jury whether any member was a stockholder in any corporation. Defense counsel argued that a negative response should foreclose further questioning along this line but that if the answer was affirmative, plaintiff should be permitted to inquire as to the type and the nature of the corporation. The Supreme Court of South Dakota, in an opinion by Rudolph, J., approved this procedure in the following language: "We believe the form of question requested by defendant had it included being an agent or employee of any corporation would have served every legitimate purpose in this case."

GARNISHMENT DISALLOWED AS TO INSURER'S TORT CLAIM AGAINST LIABILITY INSURER

Paul v. Kirkendall, Utah, 311 P.2d 376.

Plaintiff obtained a $20,000 judgment on a tort claim against defendant who was insured under a $10,000 liability policy. After receiving payment to the limits of the policy, plaintiff sued out a writ of garnishment against the insurer for the excess alleging that the defendant had an unliquidated tort claim against the insurer because of negligence and bad faith in failing to settle plaintiff's tort claim for less than the policy limits. The Supreme Court of Utah, speaking through Worthen, J., held that any such claim on behalf of defendant was not such a chose of action held by the insurer for insured as to be subject to garnishment.

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CITY LIABLE FOR JAILOR'S TORT

Hargrove v. Town of Cocoa Beach, Fla., 96 So.2d 130.

Plaintiff's deceased was incarcerated in the town jail while in a helpless condition because of excessive intoxication. It was alleged that he was locked in a cell and left unattended and suffocated from inhalation of smoke when a fire broke out. The Supreme Court of Florida, speaking through Thornal, J., declared that a municipal corporation should have no immunity from liability for torts of police officers. The court said: "To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism."

RES IPSA LOQUITUR NOT AVAILABLE IN MALPRACTICE ACTION

Johnston v. Rodis, D.C., 151 F. Supp. 345.

Claiming that she had suffered a broken arm during an electroshock treatment, plaintiff and her husband brought a malpractice action against the attending psychiatrist. In resistance to a motion for summary judgment, plaintiffs contended that they were entitled to submit the case to the jury under the res ipsa loquitur doctrine. The United States District Court for the District of Columbia, Holtzoff, J., rejected this contention saying, "* * * [the doctrine] does not ordinarily apply to cases of injuries caused by the careless act or thoughtless omission of a human being." The court added that the practical effect of applying the doctrine to malpractice actions "might place every doctor on the defensive against any disgruntled patient whom he has failed to cure."

COURT LACKS POWER TO FIX CONTINGENT FEE SCHEDULE

Gair v. Peck, 165 N.Y.S.2d 247.

In New York, the Supreme Court, Ap-

pellate Division, First Department, adopted a rule establishing a schedule of fees in personal injury and wrongful death cases. However, the Supreme Court, Special Term, Stevens, J., has determined that the Court lacked authority to do so. The Court was of the opinion that the power was neither inherent nor granted by the statute authorizing promulgation of rules of practice and procedure or the statute under which the Court has supervisory powers over members of the Bar.

DEAD MAN'S STATUTE

Sears, Roebuck and Company v. Jones, Tex. Civ. App., 303 S.W.2d 432.

One of the persons involved in an automobile accident died after action had been brought against him. In his deposition he had testified that he did not remember anything about the accident, as he was intoxicated. At the trial, defense counsel objected to the admission in evidence of the deposition of the other person involved in the accident on the ground that it violated the dead man's statute. The Court of Civil Appeals, Hale, J., announced that the testimony of the survivor was not foreclosed by this statute since deceased's lips were not closed primarily because of his death but because of his intoxication. The court said: "The proper test in determining whether testimony violates the provision of this article of the statutes is whether or not, if the witness testified falsely, the deceased, if living, could have contradicted such false testimony of his own knowledge."

WORKMEN'S COMPENSATION BENEFITS CONTINUED DESPITE REFUSAL OF RUPTURED SPINAL DISC OPERATION

Edwards v. Travelers Insurance Company, Tenn., 304 S.W.2d 489.

An employee who had received a ruptured intervertebral disc in the course of his employment was threatened with suspension of his workmen's compensation benefits unless he submitted to corrective surgery. However, the Supreme Court of Tennessee, speaking through Tomlinson, J., classified the proposed laminectomy as one of those operations which is so dangerous as to justify the employee's refusal to undergo the risk involved.

NEW FLORIDA APPELLATE COURTS BEGIN FUNCTIONS

Vandercar v. David, Fla. App., 96 So.2d 227.

Three intermediate appellate courts have been added to the judicial structure in Florida. In one of the first matters before it, the District Court of Appeal for the Third District was called upon to decide whether the defenses of contributory negligence or assumption of risk were available to a dog owner sued for injury caused by his dog other than by biting. The state has two dogownership liability statutes. One of long standing imposes liability upon owners for damages to persons without mentioning defenses. A recent law imposes liability for dog bites but frees the owner of liability if the person damaged mischievously or carelessly provoked or aggravated the dog. In the instant case, it was claimed that plaintiff had induced the dog's playful conduct which caused her to fall. The court, speaking through Chas. Carroll, Chief Judge, held that this defense was available.

FARM LABORERS NOT EMPLOYEES DURING RIDE HOME

Southern Farm Bureau Casualty Ins. Co. v. Bohls, Tex., 304 S.W.2d 534.

A cotton farmer engaged laborers to pick his cotton under an agreement providing for free transportation to and from the farm. While being so transported by truck, some of the laborers were injured when the truck partially overturned. The insurance policy covering the truck excluded liability for bodily injury of insured's employees while engaged in the employment of insured. The insurer sought a declaratory judgment as to its responsibility to defend any suit arising out of the accident. The Court of Civil Appeals of Texas, in an opinion by Archer, Chief Justice, held that the laborers at the time of accident were not "engaged in the employment of the insured." Faced with contrary holdings in workmen's compensation cases, the Court said that the rules for construing insurance policies differed from the rules for construing the Workmen's Compensation Act.

Coverage Under the Automobile Liability Policy and Under the Comprehensive General Liability Policy When an Employee of the Former's Named Insured Is Injured Through the Negligence of the Latter's Insured During a Loading or Unloading Operation

B. H. CLAMPETT*
Springfield, Missouri

IT IS NOT uncommon for commercial vehicles to be used on jobs where loading or unloading is done by persons otherwise unrelated to these vehicles. Neither is it unusual for the driver of such a vehicle to be injured during the loading or unloading operation, even though he is only a bystander or onlooker with respect to it. Nor is it unprecedented for the injury to occur under circumstances sufficient to impose legal liability upon the loader or unloader. When these circumstances combine against the usual insurance background (a policy of workmen's compensation insurance covering the driver, a policy of automobile liability insurance covering the vehicle and a policy of comprehensive general liability insurance covering the loader or unloader), uncommonly interesting questions of coverage arise. My purpose is to identify some of these questions, to discuss some of the recent cases treating them and to draw appropriate conclusions.

To provide for continuity in the discussion of distinct but related questions, let us suppose: (1) that A, a truck driver employed by B, delivers a load of steel trusses to a job site where such trusses are to be unloaded by C, or C's employees, using a crane; (2) that, while the unloading is in progress, A, not assisting in the operation, is struck and injured through the negligence of D, C's crane operator; (3) that A sues C and D—a supposition scarcely far-fetched once the others are made—seeking damages; (4) that B has a policy of workmen's compensation insurance covering A and a policy of automobile liability insurance covering his vehicle; and (5) that C has a policy of comprehensive general liability insurance covering his unloading operation.

Having so supposed, we may now inquire:

1. Are C and D additional insureds under the policy of automobile liability insurance covering B's vehicle?
2. If so, is the coverage thus extended otherwise excluded?
3. What are the obligations of the automobile liability carrier and of the comprehensive general liability carrier, respectively, if both of them provide coverage, to satisfy any judgment obtained by A against C and D, or either of them?

Are C and D Additional Insureds Under the Policy of Automobile Insurance Covering B's Vehicle?

C, it will be recalled, has a policy of comprehensive general liability insurance and thus is covered thereunder, as the named insured, with respect to A's injury. D, as C's employee, *may* likewise be covered thereunder as an additional insured. However, the circumstance of "other insurance" precludes neither C nor D, if the insuring agreements are otherwise satisfied, from having coverage, as additional insureds, under B's automobile liability policy.

In order for C and D, neither of whom are co-employees of A,[1] to qualify as additional insureds under B's policy, two requirements must be satisfied: (1) they must have been using B's vehicle (2) with

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[1]Not being co-employees of A, C and D are thus not excluded by Insuring Agreement III (a) (2): "* * * The insurance with respect to any person or organization other than the named insured * * * does not apply; * * * (2) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer."

B's permission. Use, of course, includes "the loading and unloading thereof". Thus, in the hypothesized case, C and D quite clearly are additional insureds under B's automobile liability policy, for they were unloading B's vehicle with B's permission.

To illustrate, we refer briefly to *Bituminous Cas. Co. v. Travelers Ins. Co. et al.*,[2] (hereinafter called "the *Travelers* case"); *Maryland Casualty Co. v. New Jersey Manufacturers Cas. Ins. Co.*[3] (hereinafter called "the *Manufacturers* case"); and *Spurlock v. Boyce-Harvey Machinery, Inc. et al.*,[4] (hereinafter called "the *Boyce-Harvey* case").

The *Travelers* case was an action by Bituminous, as the comprehensive general liability carrier for the Rochester Quarry Company, against Travelers, as the automobile liability carrier for one Williams, to recover (among other items) $9,000.00 paid by Bituminous in satisfaction of a judgment obtained by Williams against Rochester and one Wegman for bodily injury sustained by Williams when he was struck by a power shovel being used by Rochester's employees, including Wegman who was its operator, to load his truck. Among other questions, the court was required to decide whether Rochester and Wegman were additional insureds under Travelers' policy. The decision was:

> "* * * Travelers' position is that before a case can come within the loading and unloading provisions of an automobile policy, the instrumentality causing the damage must be the truck itself or the operator of the truck. But the injury to Williams would not have occurred but for the loading of the truck, and since Travelers expressly insured against liability arising out of the loading, without regard to who was doing the loading, it would follow that Wegman in loading the truck and using it for that purpose, was an insured within the meaning of the express terms of the policy * * *".

In the *Manufacturers* case, one Kelly, a driver employed by Bair Trucking Company, was struck and injured by a large roll of paper being loaded on his truck by Port Commission employees, who were using a lift truck. Maryland, as the comprehensive general liability carrier for Port Commission, sought, alternatively, indemnification for, or contribution toward, $20,000.00 paid by Maryland, on behalf of Port Commission, in settlement of Kelly's bodily injury claim. Its target was Manufacturers, as the automobile liability carrier for Bair; and its theory was that Port Commission, and its lift truck operator, were additional insureds under Manufacturers' policy. The court agreed:

> "* * * Manufacturers does not argue too strenously concerning its liability under the omnibus clause as insurers of the defendants Cherry and South Jersey Port Commission. The status of the law on this point seems to be more or less settled and the facts would justify the conclusion that the defendant New Jersey Manufacturers is an insurer of these defendants. Citing cases."

Slightly different facts gave rise to the *Boyce-Harvey* case. Spurlock, a driver employed by Garig Transfer, Inc., was dispatched to Boyce-Harvey to pick up a shipment of 50 grader blades for delivery to various consignees. These blades, each weighing 53 pounds, were stacked in two 25-blade bundles. Each bundle was tightly bound at both ends with wire.

On Spurlock's arrival, one Jones, an employee of Boyce-Harvey, cut the wire securing one of the bundles and commenced to tag the blades. As Jones tagged the blades, Spurlock "shoved and pulled" them onto his truck. Once the first bundle was loaded, Jones cut the wire on one end of the second bundle. When he did so, three blades fell off the stack and fractured Spurlock's right foot.

In Spurlock's action against *Boyce-Harvey* for bodily injury, defended by Travelers under its comprehensive general liability policy, American Mutual Liability Insurance Company, Garig's workmen's compensation carrier, intervened to recover its expenditures and Travelers, itself unloaded upon in the *Bituminous* case, retaliated by claiming over against American, as the automobile liability carrier for Garig, on the theory that Boyce-Harvey, and its employee Jones, were additional insureds under American automobile policy.

As to Travelers' argument that Jones was an additional insured under American's automobile policy, disputed by American on the theory that tagging and

[2] 122 F. Supp. 197 (D. C. Minn., 1954).
[3] 128 A. 514 (N. J. Super, 1957).
[4] 90 So. 2d 417 (La. App., 1956).

loading were distinct and separate operations, the court concluded that "tagging was an integral part of the continuous process of loading the grader blades from the Boyce-Harvey premises onto the truck" and thus held that Jones was an additional insured under American's policy.

That C and D are additional insureds under B's automobile liability policy thus seems clear, for the loading and unloading clause extends coverage, as the foregoing cases indicate, without regard to who performs the operation and with respect to any integral part of the continuous process.

If C and D Are Additional Insureds Under the Policy of Automobile Liability Insurance Covering B's Vehicle, Is the Coverage Thus Extended Otherwise Excluded?

C and D, notwithstanding the circumstance of "other insurance", are additional insureds under B's automobile liability policy. However, coverage extended generally may be excluded specifically. So, it remains to be seen whether, because A received (or was entitled to receive) workmen's compensation benefits from B, the rights of C and D, as additional insureds, to protection under B's automobile liability policy are defeated by exclusions (hereinafter called "the employee exclusions") such as the following:

> "(d) under coverage A, to bodily injury to or sickness, disease or death of any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefore are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured: "(e) under coverage A, to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;"

Is coverage excluded by the fact that A is an employee of B, the named insured—or, in order for coverage to be excluded, must A have been an employee of C and D, the additional insureds? At this juncture, the problem complicates, for the real question (Who is "the insured" as that descriptive phrase is used, without qualification, in the employee exclusions?) transcends matters related to the loading and unloading clause. It has arisen in assorted cases and has been decided in assorted ways. An answer thus cannot be given, except with respect to particular jurisdictions. Still, to note how, in comparable loading and unloading cases, our companions C and D would have fared, will not be an inquiry irrelevant to our purpose.

In *St. Paul-Mercury Indemnity Company v. American Fidelity and Casualty Co.*,[5] C and D would not have been aggrieved. There one Estes, driving his own truck under lease to Osborne & Company, delivered 76 rolls of wire mesh consigned to Larsen & Larsen, Inc. While Larsen's employees were unloading the consigned material, Estes was struck and injured by one of the rolls.

Estes then sued Larsen, insured by St. Paul-Mercury under a comprehensive general liability policy, and others. St. Paul, while the damage suit still was pending, commenced an action against American, as Osborne's automobile liability carrier, and the other interested parties, to have declared American's obligations with respect to Estes' suit.

The court concluded that Larsen was an additional insured not excluded from coverage under American's automobile liability policy and remarked:

> "The Court is persuaded that the better existing authority construing the effect of exclusion clauses, such as those found in (d) and (e) of the policy issued by American Fidelity and Casualty Company,[6] is to the effect that the proper construction of the words 'the insured' contained in exclusion clauses (d) and (e) * * * operate to exclude coverage only in those cases in which the injured party is an employee of the insured claiming coverage under the policy, whether such insured be the named insured or an additional insured under the omnibus clause. Citing cases."

Neither would C and D have been aggrieved in *Pleasant Valley Lima Bean Growers and Warehouse Association v.*

[5] 146 F. Supp. 44 (D. C. Cal., 1956)

[6] "(d) under coverages A & C, to bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of the automobile;
"(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;"

Cal-Farm Insurance Co.[7] in which case, one Nungaray, employed by Brucker as a driver, was injured while employees of Pleasant Valley were unloading lima beans from his truck. A damage suit, prosecuted by Nungaray, as plaintiff, against Pleasant Valley, and one of its employees, as defendants, followed. While this suit was pending, U.S.F.&F., the comprehensive general liability carrier for Pleasant Valley, commenced a declaratory judgment proceeding against Cal-Farm, as the automobile liability carrier for Brucker, to have determined Cal-Farm's policy obligations with respect to Nungaray's suit.

It was declared that Pleasant Valley, and its employee, were additional insureds under Cal-Farm's policy and that coverage was not defeated by the employee exclusions:

> "The exclusion clause must be read as a whole and we think leads inescapably to the conclusion that it means only that the coverage, whether of the named or the additional insured, does not apply to any one who has liability under workmen's compensation laws. As Pleasant Valley and Croker are additional insureds under defendant's policy, and there is nothing in the record to show that either Croker or Pleasant Valley is obligated to Nungaray under workmen's compensation law, with respect to the accident, it is clear that Pleasant Valley and Croker are not excluded from policy protection as to an action brought by Nungaray against them for personal injuries."

Nor would they have been aggrieved by the *Boyce-Harvey* case[8] (where, as the reader will recall, Spurlock, Garig's employee, was injured during the loading of his truck under circumstances sufficient to impose legal liability on Boyce-Harvey), for, answering American's argument that the employee exclusions of its policy defeated coverage, the court noted:

> "* * * our Supreme Court * * * has interpreted the clauses in question so as not to bar recovery by an employee of the *named insured*, when the cause of action is based upon the negligence of the omnibus insured, if there is no employer-employee relationship between the injured person and the omnibus insured. Citing case.
>
> "Since there is no employer-employee relationship between Bennie Jones or Boyce-Harvey on the one hand, under the Supreme Court decision in the Pulle case the employee exclusions in the American Mutual policy are not applicable herein; * * *"

On the other hand, they would not have been satisfied in the *Manufacturers* case where, as it will be recalled, Port Commission, and one of its employees, sought protection under Bair's automobile liability policy with respect to a claim by Bair's driver, Kelly, for injuries received by him while Bair's truck was being loaded by Port Commission employees. For, in this case, the court, although acknowledging that Port Commission and its employee were additional insureds under Bair's automobile policy, excluded coverage under the employee exclusions—its position being that coverage is excluded if the claimant is an employee of the named insured, regardless of whether protection is sought by the named insured or by an additional insured.[9]

In any event, it is apparent from the foregoing cases, and others not mentioned herein, that the odds are no worse than even, and perhaps better, that C and D, if they qualify as additional insureds under B's automobile liability policy, are not excluded from coverage as to A's claim because of the employee exclusions.

What Are the Obligations of the Automobile Liability Carrier and of the Comprehensive General Liability Carrier, Respectively, If Both of Them Provide Coverage, With Respect to Any Judgment Obtained by A Against C and D, or Either of Them?

If C and D, or either of them, are additional insureds not otherwise excluded from coverage under B's automobile liability policy, the respective obligations of the automobile liability carrier and of the comprehensive general liability carrier become somewhat confused. Whether there is concurrent coverage, from which expenditures shall be pro-rated in accordance

[7] 298 P.2d 109, (Cal. App., 1956).

[8] This particular point evidently was not raised in the *Travelers* case, perhaps because the law is settled in that jurisdiction.

[9] The court mentioned, and perhaps was influenced by, the circumstance that Maryland Casualty Company, the comprehensive carrier, had taken the opposite position—and had prevailed—in *Standard Surety & Casualty Co. of New York v. Maryland Casualty Company*, 281 App. Div. 446, 119 N.Y. S. 2d 795.

with policy provisions, or whether there is primary and secondary coverage, depends upon matters not included within our hypothesization.

First of all, it must be known whether C's liability to A depends upon, or exists independent of, the master-servant relationship between him and D. Next, it must be known, if C's liability to A arises from C's relationship to D, whether D is covered, as an additional insured, under C's comprehensive general liability policy.

It is essential to know these things because (*Pacific Employers Ins. Co. v. Hartford Acc. & Ind. Co.*, 228 F. 2d 365 (9 Cir., 1955):

> "* * * An insurer providing extended coverage is ultimately liable as against an insured providing coverage only to the named insured, where the named insured's liability is vicarious only, and that named insured has a right of recovery over against the person or persons primarily liable, to whom coverage has been extended only by the extended coverage provision of the first insurer."[10]

With these unknown factors in mind, we return to the *Travelers*, *Boyce-Harvey*, and *Pleasant Valley* cases to note what, with regard to the respective obligations of the automobile liability carrier and of the comprehensive general liability carrier, was held, and on what the holdings turned.

In the *Travelers* case, it was held that the automobile liability policy issued by Travelers and the comprehensive general liability policy issued by Bituminous provided concurrent coverage, so that, between the insurers, obligations were determinable under the pro-rata clause in Travelers' policy.[11] So holding, the court took care to point out that Wegman, Quarry Company's employee, was an additional insured under Quarry Company's comprehensive general liability policy by virtue of its "hired automobile" coverage[12] in other words, that both carriers extended coverage to the person primarily liable.

In the *Boyce-Harvey* case, the court likewise held that the automobile liability policy issued by Travelers and the comprehensive general liability policy issued by American Mutual provided concurrent coverage, so that between the insurers, obligations were determinable on a pro-rata basis. However, in the *Boyce-Harvey* case, unlike the *Travelers* case, Jones (the negligent employee) was not covered under the comprehensive general liability policy. And, the result hinged, as the following language indicates, on the nature of Boyce-Harvey's liability.

> "Were the liability of Travelers predicated simply upon the negligence of Jones, employee of its named insured—and therefore simply a vicarious liability — then counsel's skillful argument finds much support in jurisprudence following identical logic to reach the result argued for. * * *
>
> "However, while the liability of American Mutual rests upon the presumed negligence of Jones, it omnibus insured, in striking the wire binding the stack of blades so as to cause some of them to fall and injure the unsuspecting plaintiff or failing to check the bundles before striking, etc.; the liability of Travelers is based not only upon Jones' presumed negligence, but also upon the concurrent grounds of the presumed negligence of Boyce-Harvey's manner of stacking the bundles and/or its failure as owner of the premises to afford business invitees reasonably safe premises."

In other words, Boyce-Harvey's liability existed independent of, as well as because of, the master-servant relationship between it and Jones.[13] Thus, between Boyce-Har-

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[10]See also *Maryland Cas. Co. v. Employers Mutual Liability Ins. Co.*, 208 F. 2d 731 (2 Cir., 1953); *Canadian Indemnity Co. v. United States Fidelity & Guaranty Co.*, 213 F. 2d 658 (9 Cir., 1954).

[11]Travelers' pro-rata obligation extended not only to the judgment, but also the expenses of litigation, including attorneys' fees.

[12]The court's holding that the Williams' truck was a "hired automobile" within the meaning of Quarry Company's comprehensive general liability policy is itself unusually interesting and portends ramifications far beyond the scope of this paper.

[13]The court was able to survey the factual situation for negligence, without regard to the instructions submitting Spurlock's case to the jury, because his case was prosecuted and submitted under the *res ipsa loquitur* doctrine.

vey and Jones, neither was primarily liable.

In the *Pleasant Valley* case, however, the obligation of the automobile liability carrier was declared to be primary and that of the comprehensive general liability carrier to be secondary, for the negligent employee (Croker) was not an additional insured under Pleasant Valley's comprehensive general liability policy and Pleasant Valley's liability did not exist independent of the master-servant relationship.[14]

Such then are the three situations which may be presented.[15] First, as is exemplified by the *Travelers* case, the negligent employee (D) is covered as an additional insured under the comprehensive general liability policy. In such case, there is concurrent coverage, and the respective obligations of the automobile liability carrier and of the comprehensive general liability carrier are determined by the "other insurance" provisions. Next, as is illustrated by the *Boyce-Harvey* case, the negligent employee (D) is not covered as an additional insured under the comprehensive general liability policy, but the carriers' respective obligations still are determined by the "other insurance" provisions because C's liability exists independent of the master-servant relationship between him and D. And, last, the negligent employee (D) is not an additional insured under the comprehensive general liability policy and C's liability does not exist independent of his relationship to D — in which case, the automobile liability carrier, providing the only coverage applicable to D, must, at least to the extent of its policy limits, bear the whole loss.

From the foregoing, a number of conclusions are indicated:

1. Persons loading or unloading a motor vehicle are additional insureds under the automobile liability policy covering such vehicle, even though one or more of them is insured with respect to the same hazards under a policy of comprehensive general liability insurance.

2. Such person or persons may not be (and, in most jurisdictions, probably are not) excluded from coverage with respect to bodily injury claims prosecuted by an employee of the named insured of the automobile liability policy.

3. The obligations of the automobile liability carrier and of the comprehensive general liability carrier, respectively, in such cases are concurrent, and thus determinable by the "other insurance" clauses, or primary and secondary depending upon (1) whether the active tort-feasor is also an additional insured under the comprehensive general liability policy (2) and, if not, whether the liability of his master (the named insured under the comprehensive general liability policy) flows from or exists independent of, the master-servant relationship.

Likewise, a number of *caveats* are evident:

1. Counsel handling (and claims personnel supervising) these claims for the injured person's employer should recognize a conflict of interest between the workmen's compensation carrier and the automobile liability carrier, if these coverages are in different companies.

2. Counsel handling (and claims personnel supervising) these claims for the comprehensive general liability carrier, should take care to exclude from the injured party's complaint or petition, especially before a voluntary settlement is made, any allegations of negligence not premised on the master-servant relationship.

3. Counsel handling (and claims personnel supervising) these claims for both the automobile liability carrier and the comprehensive general liability carrier should not permit a third company with "hired vehicle" coverage on the loader or unloader, and his employees, to "sleep" through such a situation.

And, in view of the apparent obligation of the automobile liability carrier to respond in damages to employees of its named insured for the legal liability of an otherwise adequately insured tort-feasor, it might be suggested that certain policy revisions are indicated.

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[14]"* * * Reading the Nungaray complaint as a whole, we are of the opinion that Pleasant Valley's negligence is therein predicated upon the negligence of Croker, and that it does not allege separate, concurring negligence on Pleasant Valley's part."

[15]A fourth situation could arise if C has "hired automobile" coverage, under which D is an additional insured, with still a third company.

Court Orders Disclosure of Policy Limits

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IN THE case of *People ex rel. Alveston Terry, Petitioner, v. Harry M. Fisher, Judge of the Circuit Court of Cook County, Respondent,* No. 3411, Justice Bristow of the Illinois Supreme Court rendered a far-reaching decision which was filed with the clerk on the 20th day of September, 1957. In this case, the Illinois Supreme Court by, unanimous opinion in an original mandamus proceeding, held that under Illinois Civil Practice Act and Rules, a defendant can be compelled to answer discovery interrogatories respecting the *existence* and *amount* of any liability insurance.

Civil Practice Act, section 58(1), (Ill. Rev. Stat. 1955, chap. 110, par. 58(1),) provides that, "Discovery, admissions of fact and of genuineness of documents and answers to interrogatories shall be in accordance with rules." Supreme Court Rule 101.19-11, relating to interrogatories, provides that they may be served within the same time and under the same circumstances as depositions may be taken, and Rule 101.19-4 defines the scope of examination on deposition. This latter rule provides: "Upon a discovery deposition, the deponent may be examined regarding any matter, not privileged, relating to the merits of the matter in litigation, whether it relates to the claim or defense of the examining party or of any other party, including the existence, description, nature, condition and location of any documents or tangible things and the identity and location of persons having knowledge of relevant facts."

The courts of Illinois, prior to the above decision, had not determined whether the existence and amount of defendant's insurance was discoverable under Supreme Court rules. In instant case, the court reviewed the pro and con decisions of other jurisdictions, noting that the basic reason for refusal to permit such interrogatories without reference to any practice act was on the ground they did not constitute material and competent evidence.

The court in its decision adopts the pragmatic concept of the discovery rules, saying, "We must reject at once as authority those cases limiting pre-trial discovery to matters admissible in evidence, *Goheen v. Goheen,* 9 N. J. Misc. 507, 154 Atl. 393 (1933) and *Bean v. Best,* 80 N.W. 2d 565, as being contrary to both the terms and intent of the Rule."

In instant case, the defendant advanced the argument approved in the cases of *Jeppesen v. Swanson,* 243 Minn. 547, 68 N.W. 2d 649, and *McClure v. Boeger,* 105 F. Supp. 12, that if a defendant is required to disclose the fact and limit of liability insurance, he could lawfully be required to disclose all of his financial assets. In the *Terry case, supra,* the court in rejecting this reasoning and in complete disagreement with the *Jeppesen* and *McClure* cases, says, "But in our opinion it is answered by the statutory provisions that confer an interest in such a policy on every member of the public that is negligently injured and by the unique characteristics of a liability insurance policy." The court then refers in detail to the sections of the Illinois statute which, it is asserted, sustains their position, namely:

1. *Ill. Rev. Stat. 1955, Chap. 73, par. 1000,* requires certain standard provisions to be included in liability policies affording injured persons a right of action against the insurer if execution against the insured is returned unsatisfied.
2. *Ill. Rev. Stat. 1955, Chap. 95½, par. 58K,* provides certain minimum liability insurance coverage for motor vehicles.
3. *Ill. Rev. Stat. 1955, Chap. 95½, par. 253,* requires motor carriers to have specified liability insurance policies before permits may be issued.

The court in consideration of the above cited statutory provisions and in reliance upon them states: "It is clear that the legislature by virtue of the foregoing enactments has placed liability insurance in a category distinct from the insured's other assets so far as persons injured by the negligent operation of his motor vehicle are concerned. Thus under our Statutes, as in

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California, liability insurance is not merely a private matter for the sole knowledge of the carrier and the insured, but is also for the benefit of persons injured by the negligent operation of the insured's motor vehicle."

The utilitarian or economic approach to the problem here presented is underlined by Justice Bristow in his decision and the following statement from the decision is really the key to the end reached by the decision: "Litigation is a practical business. The litigent sues to recover money and is not interested in a paper judgment that cannot be collected. The presence or absence of liability insurance is frequently the controlling factor in determing the manner in which a case is prepared for trial."

Finally, the court held that the order to disclose the existence of liability insurance and its limits did not infringe upon the defendant's constitutional rights and immunity against unreasonable search and seizure guaranteed by the constitution.

A petition for rehearing was denied November 18, 1957.

The decision, of course, raises the next problem of what the attitude of the trial courts will be with reference to permitting the information obtained by interrogatories to go to the jury. Inasmuch as the rationale of the court's decision in the *Terry* case seems to be based upon the theory that the information was to be used for the purpose of arriving at a settlement and reducing litigation, it does not appear that the reasoning of that case would be extended to permitting the information to go to the jury.

It is quite likely, however, that many trial courts will seize upon the *Terry* case to expand the admission of such evidence and thus indirectly promote the pressure of settlement upon the defendants in pretrial conferences.

An interesting sidelight on the *Terry* case is that, in a recent hearing before a circuit court trial in Illinois, the trial judge required the defendant by order to answer interrogatories as to fact and limit of insurance in a dram shop case. While that holding was only a trial court holding, it nevertheless points the road down which the *Terry* case will probably take the entire insurance industry.

Editor's Note: Regional Editor James P. Allen, Jr., calls our attention to the fact that on October 25, 1957, the Supreme Court of Florida held that the Florida Rules of Civil Procedure do not provide for discovery of the policy limits of a defendant's insurance coverage. This was a four to one decision, the case being *Brooks v. Owens,* 97 So. 2d 693.

This court, as did the Illinois Supreme Court, reviewed federal and state court cases on this subject and concluded, "We adopt the view expressed above that the limits of liability insurance on a policy covering an automobile of a defendant are not proper matters subject to discovery under Florida R. Civ. P. 1. 21 (b). It is our view that the rule is applicable only to those matters admissible in evidence or calculated reasonably to lead to the discovery of admissible evidence. The matter must be relevant to either one of those expressed purposes concerning a pending action. It must pertain either to the proof or defense of an action."

Mr. Allen says:

"It is to be noted that the Florida rule is substantially the same as the federal rule, but the Illinois rule is more restrictive than the federal rule and omits the second sentence of Federal Rule 26 (b)".

"It is a hallmark of distinction to be invited to write an article for the Journal of the International Association of Insurance Counsel. If and when any of you are so invited, I hope you will rise to the occasion. I know that you are busy men, but by that very same fact you somewhere in the wide reaches of your practice have had to explore some fields of law perhaps more thoroughly than any of our other members. If so, you owe it to your brethren in the Association to prepare adequate discussion of those particular subjects."

President Stanley C. Morris
Coronado, California, July 9, 1955

The Underwriting Intent

J. RALPH DYKES*
New York, New York

THE STANDARD automobile policy is an industry form of policy contract, as are many other insurance policies. Their terms and provisions are, therefore, generally uniform in all policies used by members of the industry. The automobile policy bears the name "standard" for that very reason. It is standard terminology whether the policy is issued by one insurance company or another. These standard policy forms are prepared by a policy forms committee under the direction of the National Bureau of Casualty and Surety Companies and are approved by the insurance department of New York and other states. Insurance companies which do business in New York and which are not members of the National Bureau are required to use such approved forms and no others and generally follow their underwriting intent.

The underwriting intent of the policy coverage as expressed in the language of the policy is, therefore, obviously that which was intended by the policy forms committee and certainly the members of the National Bureau are morally bound to respect that underwriting intent and, with very rare exceptions, do respect it where, of course, the intent of the forms committee is established and well known.

It is an axiom that the intent of any contract or legal document should govern its interpretation where such intent is ascertainable. That intent has been established and widely publicized since 1935 when the standard automobile policy was first put into use. E. W. Sawyer, who was counsel for the National Bureau and the forms committee which drafted the first standard automobile policy, made reference on page 92 of his book[1] to the intention of the committee with reference to the employee exclusion.[2] In 1941 in a letter to the chief executives of bureau members he pointed out that it was the intention of the rating committees to interpret the word "insured" in the employee exclusion as embracing both the name insured and any omnibus insured, but that it is to be interpreted severally with respect to claims and suits so as to refer only to the interest against whom claim is made or suit is brought. On June 10, 1954, James B. Donovan, General Counsel of the National Bureau, wrote to the bureau members making reference to Mr. Sawyer's letter in 1941, and stating:

> The Bureau's interpretation of the employee exclusion remains unchanged. Hence, a suit by an employee of an omnibus insured against a named insured is not intended to be outside the policy's coverage because of the employee exclusion. So, too, suit by an employee of a named insured against an omnibus insured is intended to be within the scope of the policy.
>
> It should also be noted that if the term "insured" as used in the employee exclusion were not considered severally with respect to claims and suits, the name insured would actually receive less protection than he otherwise would be afforded.

So that there has been no question about the underwriting intent of the employee exclusion.

The case of *American Fidelity & Casualty Company, Inc. v. St. Paul Mercury Indemnity Co.*, 248 F.2d 509, 12 C.C.H. Automobile Cases (2) 408, is a case where such underwriting intent was not followed by the court. This case was a dispute between two insurance companies as to which policy covered the claim involved. To insurance company counsel and underwriters, the situation involved is a familiar and commonplace one. Osborne was insured by the appellant, American Fidelity and Casualty Company. Larson was insured by the appellee, St. Paul Mercury Indemnity Company. Estes was the employee of Osborne and was injured while in his em-

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[1]Automobile Liability Insurance by E. W. Sawyer, 1936 Ed., published by McGraw-Hill Book Company.

[2]This policy does not apply: (d) to bodily injury to or death of any employee of the insured while engaged in the employment . . . of the insured.

ployment. Estes sued and obtained a judgment against Larson who was an omnibus insured under appellant's policy, unless excluded by the employee exclusion. Appellant would therefore be the primary carrier on Larson as appellee's policy contained the usual provision that under such circumstances, its coverage was "excess."

The lower court had held in accordance with the "underwriting intent" that "insured" in this exclusion was the insured who was claiming coverage and, of course, that was Larson. *Estes was not an employee of Larson* and, therefore, coverage for Larson was not excluded in appellant's policy. The appellate court reversed, interpreting the employee exclusion to mean that appellant's policy did not cover Larson.

In a note to the opinion, the court made reference to a special endorsement on appellee's policy, providing that if the other insurance was "unavailable" by reason of "denial of liability or otherwise", its coverage would be primary and called attention to the denial of coverage by appellant. But this could hardly have formed any basis for the court's decision, as appellant's coverage was "available" under the lower courts decision and would have been available if the court of appeals had not decided that appellant's policy did not cover Larson.

Of course, the prerogative of the court is to apply its own interpretation, but the underwriting intent of the policy as expressed by the industry which prepared the coverage and drew the policy contract was not followed in this case. If Larson had not carried his own policy with the appellee the result in this case would have been that Larson was without insurance coverage. Such a result was never intended by the insurance industry.

LAW-SCIENCE INSTITUTE

FEBRUARY 6, 7 AND 8, 1958

GALVESTON, TEXAS

PERSONAL injury litigation and medicolegal trial technique involving injuries of the nervous system, and medicolegal aspects of surgical and orthopedic injuries, are the subjects to be covered at the Mid-winter Law-Science Short Course scheduled for the Hotel Galvez, Galveston, Texas, on the above dates. It is sponsored by the Schools of Law and Medicine of the University of Texas.

A preliminary program of The Law-Science Academy will be presented at the same place on February 3, 4 and 5, 1958. It will deal with "Important Medicolegal Problems, Concepts, and Mechanisms Exemplified" and with "Current Scientific Developments of Medicolegal Importance Involving the Nervous System and Human Behavior."

Further information may be obtained from Dr. Hubert Winston Smith, University of Texas, Austin 12, Texas.

Confidential Chat on the Craft of Briefing*

MORTIMER LEVITAN**
Madison, Wisconsin

THIS chat on the craft of briefing is intended solely for discreet lawyers who invariably respect confidences. It was prepared for publication only after repeated assurances by the editors that judges never read law reviews. Whether this is good or bad, true or false, judges will benefit most from this article if they remain unaware of its contents.

What briefs need most in this world is readability.[1] Briefs should also be convincing, if possible, but unless they are read by somebody, they won't convince anybody of anything—except their writers, of course. Briefs have a knack of convincing their writers with the utmost of ease. Cases are not won by persuading one's self of the soundness of an argument; they are won by convincing judges — not courts, not benches, not institutions, but lawyers who have been elevated to the judiciary.

Courts cannot read. With perseverance human beings can acquire the art of reading, but institutions, organizations, divisions of government can never be endowed with that art—not even by an act of Congress. Judges, who are human beings by nature, lawyers by profession and judges by fortuity, can read and frequently do, but with all of the fascinating reading material on earth, why should they squander their reading time on briefs that are dull, obfuscated, verbose, and downright uninteresting besides? The fact that so many briefs get read is a tribute to pertinacious adherence to judicial sense of duty. When a brief is filed, it is not fed into a judicial machine, which comprehends, weighs, and evaluates automatically, and then after whirling of wheels and flashing of lights—and occasionally prolonged periods of inactivity—ejects the correct answer. When a brief is filed, it is for consideration by a man (or, possibly, a woman); which means that briefs must be addressed, not only to human intelligence, but also to human nature.

No brief should ever be written without some definite purpose in mind. Neither convention nor addiction is justification for a brief: the conformist should rebel, and the brief-writing addict should seek psychiatric aid. There are a variety of purposes — some commendable, some reprehensible—for writing briefs. It is reprehensible, for instance, to write a brief primarily to express an uncomplimentary opinion of one's adversary; it is commendatory to write a brief for the purpose of advising the court; it is neither reprehensible nor commendatory to write a brief because the client insists — merely good business. The most exemplary purpose of a brief is to assist the court in deciding the controversy either for or against one's client, but preferably in the client's favor.

The lawyer who writes a brief without a preliminary outline would if he were a carpenter, build an edifice without a plan. True, by persistently pounding away eventually a written argument might emerge, and a shelter might evolve, but the finished product would probably be bizarre rather than artistic. Briefs dictated without preliminary outlines tend to be garrulous monologues in which the lawyer strives to ascertain the determinative issues by the "talking" method, rather than the "thinking and investigating" method. The most meritorious aspect of these briefs is that they do come to an end eventually; their worst aspect is that they end where they should have started. While time spent in briefing may be wasted, time spent in outlining a brief is never wasted, for a skillfully prepared outline invariably engenders a shorter, clearer, better brief.

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*Reprinted from the Wisconsin Law Review.

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[1]When a lawyer persists in reading his brief to the judge, he admits in open court that his brief is unreadable, *i.e.*, so dull and uninteresting that no one would read it voluntarily. Reading the brief becomes permissible boorishness in only one situation—when the judge is sound asleep. It is probably because of brief-reading attorneys that some judges have succeeded in developing such marvelous facial dishonesty that they can appear intensely interested while hearing not a single word.

The effective production of a brief depends, not only on a knowledge of the law and facts involved, but also on familiarity with the background, disposition, and intellectual endowments of the judge. Different types of judges require different types of briefs; which is merely another way of saying that a brief to be effective must be written with the reader in mind. A short story intended for readers of *True Confessions* must be written differently from one intended for readers of *Harper's Magazine*. In briefing, as in short story writing, effectiveness depends upon pleasing or impressing the selected audience.

There are certain mechanical features that should characterize all briefs, regardless of the identity of the judicial target. For instance, *black* black ribbons[2] should be used for typing, not ribbons that have been pounded into pearl gray. The days or even months spent in legal research, cogitation, and dictation can be wasted by one anemic typewriter ribbon. A brief may tax or insult a judge's intelligence, but when it impairs judicial optic nerves the sensible judge stops reading and says—well, just what do judges say when they vehemently conclude that something should be consigned to a place noted for its caloric climate?[3]

There are a number of other physical characteristics of briefs that decoy judges into reading. A weighty brief—one fattened beyond the capacity of a postal scale—might get hefted, might get opened, might even get a despairing leafing through, but it won't get word-by-word perusal. Slender briefs have infinitely more allure than the obese type, and especially if well-proportioned—svelte, with emphasis supplied in just the right places. Judges, like other human beings in this radio and television age, are more likely to peruse an article in *Reader's Digest* than wade through *War and Peace*.

The paper chosen for the honor of being immortalized with the words of the brief should have sufficient opaqueness so that each typed page will not look like a double exposure. It is difficult for a judge to concentrate on the argument presented on one page when distracted by the argument peering through from the following page. There is, of course, little objection to using diaphanous paper for the copies to be presented to opposing counsel, because the chances of discovery are slight.[4]

The effectiveness of an argument may be accentuated or dissipated by the mode of presentation. An unshaved, dirty-collared, baggy-suited salesman handicaps himself in selling, no matter how superior the merchandise. A carelessly typed, poorly arranged page does the same thing, no matter how excellent the argument. A small gob of jam on a single page can destroy completely the effectiveness of the brief—even if the gob is genuine Bar-le-Duc! Misspelled, misplaced, and misused words create almost as much havoc with the selling of the argument as the gob of jam. True, a word is a word even when slightly misspelled; the difficulty is that the reader's attention l i n g e r s on the mangled word rather than on the thought intended to be conveyed. Misplaced and misused words distract attention and may suggest vagrant ideas far removed from the argument intended. As to misspelled and misused words, no remedy is 100 per cent effective, but one highly recommended is the purchase of two good desk dictionaries—each costing more than a quarter, that is[5]—to be used at least twice daily by the lawyer and as needed by the secretary.[6] As for the misplaced words—possibly the best preventative is a secretary who majored in English composition; and if that provocative helpmate is unavailable, the next best thing is the purchase of a grammar for adults and an elementary work on seman-

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[2]Black ribbons should be instantly destroyed at the first appearance of telltale gray. Their retention might tempt some recipient of a letter written with the exhausted ribbon to sneak into the office and use the ribbon to strangle the secretary who used it. If this should happen—and it should!—it is hoped that the case comes up before a judge who received a brief written with the same ribbon.

[3]This question should not be answered; it is posed only because of the editorial policy against the use of the word *hell* in articles. It is generally understood that the rule does not apply to faculty members of accredited law schools.

[4]While judges read briefs from a coercive sense of duty, lawyers are not thus bedeviled. Incidentally, that may explain why some lawyers instruct their secretaries to save all battered carbon paper for the preparation of copies of briefs intended for opposing counsel. Or, could it be the secretaries' own idea?

[5]THE AMERICAN COLLEGE DICTIONARY (Random House) qualifies easily and inexpensively. Really, two copies should be purchased, if the lawyer is to be spared the embarrassment of having his virtuous "dictionary habit" detected by his secretary.

[6]Intelligent and conscientious secretaries will naturally need the dictionary more frequently than the other kind—assuming, dangerously, that there is any other kind of secretary.

tics.[7] Incidentally, semantics should be a required study in every law school, even though it would result in precise and concise legal documents and h e n c e curtailed fees and less litigation. The only students excused should be those who intend to enter the legislative field.

A brief should be brisk but not breezy; it should neither dart nor dawdle. Arguments should not be delayed by patter, and gold-bricking words should be eliminated. The literary style used in a brief should be influenced, rather than dictated, by the judge who is the objective of the brief. If the judge feels apprehensive in the presence of polysyllables, only monosyllables should be used—although it may be permissible to slip in a few of the simpler two-syllable words. If the judge reaches for an aspirin after every c o m p l e x sentence, use only simple sentences—although an occasional compound sentence may be tolerated. However, even if the judge enjoys splashing around in Henry James sentences, the literary style of the brief should be simple, accurate, concise. A style that steals the show from the argument does a disservice to the brief. Ornateness, languidness, verbosity, circuitousness—these do more than steal the show; they ruin it. A brief is not a pasture for t h e practice of literary gymnastics by frustrated journalists; indeed, it should not be considered a pasture of any kind but rather a cubbyhole just large enough to hold the essentials, compactly and neatly arranged, of a sound legal argument.

Most ideas when sufficiently understood c a n be expressed in simple language. When a brief is peppered with Latin, leavened with bombast, and frosted with sententiousness, the writer unwittingly discloses his befuddlement. The test of a lawyer's comprehension of a legal argument is his ability to express it in language that can be understood by a layman. If an intelligent secretary understands, the chances are that the judge will also understand. Her failure to understand is the cue for revision or redictation. Incidentally, if the secretary volunteers the opinion that an argument is balderdash, she may be officious, she may be impertinent, she may even be slightly vulgar, but the chances are that she is also right.

The absence of paragraphs has undoubted value as a non-habit-forming hypnotic. Briefs, however, strive to keep judges awake —and even alert! Lawyers, then, should develop the art of paragraphing; it may not attract as much business as developing the art of putting, for instance, but it certainly will lead to better briefs. There is always the danger that a non-paragrapher may degenerate into a single-spacer—those sadistic knaves who gloat over ruined eyes and mangled dispositions.

The secret ambition of every b r i e f should be to spare the judge the necessity of engaging in any work, mental or physical. Not that judges are incapable of performing mental or physical work; most of them can perform one or the other, and many of them can do both – although somewhat reluctantly, at t i m e s. But judges, like all cultured members of the human race, enjoy b e i n g waited on. When, for example, a case is cited in support of a proposition, the judge should not be required to read page after page of dreary dissertation in order to disinter the one or two important sentences. The brief should always disclose, not only the page on which the opinion begins, but also the exact page on which the pertinent discussion occurs. Indeed, a brief truly solicitous about the judge's mental and physical welfare will, by the simple expedient of stating tersely what was involved, what the court did, and then quoting the one important sentence in the opinion, spare the judge the effort involved in reaching for, opening, and reading the report. If, perchance, there are actually two important sentences, both may be quoted; but whole pages should not be quoted even if they have the semblance of importance: pages seem more important when printed than when typed, hence the judge should be lured into reading the original.

The destruction of judicial equanimity by making it as difficult as possible to find the authorities referred to in a brief is a vicious sport that fascinates some lawyers. They place great weight on a certain case, and then use heinous ingenuity to prevent the judge from finding it. For example, if the case is from a foreign jurisdiction they will give the state report citation—which is unavailable to the judge

[7] Any grammar, whether used or not, is much better than none; ENGLISH GRAMMAR, by George O. Curme, in the COLLEGE OUTLINE SERIES (Barnes & Noble, Inc.) is infinitely better than none—especially if used. And as for semantics don't buy LANGUAGE IN ACTION, by S. I. Hayakawa (Harcourt, Brace and Company), merely for the prestige of possession; its value is dependent not upon owning but upon reading.

—and refrain from disclosing the Reporter System citation, which is available. They may even give only the Reporter System citation for local cases, apparently on the assumption that judges are required by law to know the correct citation of all cases in the official reports. If an English case, for instance, is reported in A.L.R., they omit the domestic citation and use the foreign one.

Perhaps it may be permissible to give an example of the inexplicable antics of an "inadequate citation" enthusiast when he really tries. An attorney in his brief quoted three sentences from what was presumably a case decided by a court—at least, he gave the name of a case, but he did not reveal the page on which the sentences occurred, nor did he give any clue as to the issue involved, the date of decision, or the geographical location of the court. The only clue—a false clue, it developed—was a certain volume and page of "Ann. Cas." Opposing counsel, carelessly assuming that at least one case in the brief must be in point, examined the indicated volume of *Annotated Cases,* but the case wasn't there, nor was it in any other volume of *Annotated Cases.* Had the attorney really succeeded in referring to a case that couldn't be found? Opposing counsel followed several false leads before deducing that the case—if it really was a case—might be an English compensation case. The deduction proved correct! Butterworth (B.W.C.C.) reported the English House of Lords case—it was also reported in at least ten other British sources, including *Appeal Cases.* The next deduction also proved correct: the case was important enough to warrant reporting in A.L.R.! Counsel had jerked three *chatter* sentences—not *crux* sentences—from a paragraph in the opinion of one of the Lords, as reported in A.L.R.; however, instead of giving the volume and page of the A.L.R. citation (as any considerate lawyer would instinctively do) he malevolently (or was it inspired carelessness?) had copied the volume and page used for the "A.C." citation (but without the year) as given in A.L.R., but had substituted "Ann. Cas." for "A.C." The court did not decide against the attorney because of the three untagged, displaced sentences—there was, as might be surmised, no logical basis upon which he could have been upheld—and the court refrained from commenting that desperate cases do not suspend the decencies of law practice.

Give a judge a citation he can use—one that requires the minimum of exertion! If he is required to expend his energy looking for the case, he may not have sufficient energy left to appreciate the case when he finds it. Also, the citation should be comprehensive enough for use in his opinion. The title of the case should always be given exactly as in the report, notwithstanding the occasional secretarial urge to introduce inexplicable variations. That does not mean, of course, that if the case is referred to ten times on one page, the full title must be given ten times; once on a page is sufficient, provided the nickname selected for the case is incapable of producing confusion. However, it is an imposition on the judge to require him to turn the page in order to learn the exact name and citation of the case. The fact that courts in writing for lawyers use *infra* and *supra* does not justify retaliation by lawyers when writing for judges.

Sometimes lawyers produce the illusion of erudition and industry by presenting notes and annotations without the benefit of quotation marks, without anything to suggest the source or the actual author. Now, the products of skilled annotators are of superlative value in briefing, but there is a difference between *using* an annotation and *plagiarizing* an annotation. Discovered plagiarism invariably causes diminished confidence in the offending writer; and although pretending to be the author of an outstanding piece of legal research does not necessarily mean the loss of the case, any deceit seems to give a brief an unpleasant odor—and smelly briefs are not usually convincing. Incidentally, these comments also apply to long overdue briefs.[8]

What is kept out of a brief is almost, but not quite, as important as what goes into a brief. Success in the act of omission depends upon (1) the intelligence and courage of the writer, and (2) the intelligence, experience, and personality of the judge. Profound knowledge of the subject is a prerequisite to differentiation between the important and unimportant;

[8]Most lawyers can be relied upon to keep every promise they make, big or small—except a promise to submit a brief by a stated time, possibly because they consider such promises a result of coercion and hence against public policy. It is suggested that if lawyers spent as much time *writing* their briefs as they do in *talking* about them, there would be very few late briefs.

however, while the trivial and inconsequential should be suppressed, they cannot always safely be eliminated unless the judge's valuations can be predicted. For example, a judge who has had experience with a number of somewhat similar controversies does not require as comprehensive a brief as a judge struggling with the problem for the first time. Judges really do learn by experience, no matter what a few disappointed lawyers may say. In general, the brief should contain nothing that does not serve a useful purpose in the presentation of the argument – which includes, of course, the creation of a propitious atmosphere for the argument.

Regardless of provocation or opportunity, ridicule and humor should invariably be eliminated before the brief is submitted to the judge. In ridiculing an opponent's argument a lawyer may be ridiculing one of the pet notions of the judge–and judges resent ridicule. Who doesn't? Besides, there is the horrible possibility that the argument only *seems* ridiculous because of inability to penetrate the recondite. As to humor, the danger lies in the unfortunate fact that its success depends upon the receiver as well as the sender. Ascension to the bench frequently atrophies a normal, robust sense of humor, and after a period of service–say, two or three days–a juridical sense of humor begins to show: a mysterious, inscrutable, capricious variety which turns into wrath too easily for comfort.

A brief needs something more than readability; it needs a complement of arguments. The arguments suitable for briefs are of two kinds: (1) persuasive, and (2) supportive. Persuasive arguments are those which seek to induce a judge to decide a controversy in a certain way; supportive arguments are those furnished as a courtesy to the judge for use in the opinion filed in justification of his decision. Persuasive arguments must be sound in order to be effective; supportive arguments may be spurious, for their use in the judge's opinion confers the illusion of legitimacy. Supportive arguments really supply the decor for the opinion, which usually is a skillful interplay between intellect and unconscious motivation. Judicial opinions, while belonging to a much higher caste, are closely related to the written explanations which congressmen frank home to their constituents in defense of their votes on highly political measures: the decisions and the votes are not the results of the opinions and the explanations, but vice versa.

Whether a brief accomplishes its objective of inducing a judge to decide in one's favor depends upon many factors, one of which is the persuasiveness of the arguments presented. The difficulty is that there are no precautionary mechanical, chemical, or psychiatric tests which can be applied to an argument to determine its soundness or peruasive quality. It is not sufficient to say pragmatically that any argument which persuades a certain judge is sound in his court, although possibly nowhere else; the problem is to determine *prior* to decision the reaction of a specified judge to the available types of argument, a reaction that is necessarily dependent upon his social and economic background, his education, experience, personality, and ambitions. The personality factors, incidentally, are the explanation of split decisions: when a court splits four to five, for example, that does not mean that the court is composed of five jurists and four mules, nor does it mean that the court is composed of four jurists and five mules; it means, rather, that honest, sincere, intelligent judges are impelled to different conclusions by their diverse personalities. And it means, also, that few legal problems come equipped with only one possible answer. To aggravate the difficulties, there is nothing static about a judge's sensitivity to various arguments. There really are fashions and fads in the legal reasoning: a brief compacted with cogent arguments may be considered almost chic today and dowdy tomorrow or, more likely, next month–judicial lag, you know.

The most persuasive arguments are factual rather than legal. Possibly that is because Law has borrowed infinitely more from Equity than Law has the courage to admit–which pleases rather than annoys Equity. If facts can be clarified to the degree that the barber, the grocer, and the shoemaker would consider that a certain result should follow as a matter of common sense, the probabilities are that the judge will arrive at the same conclusion. True, the judge will listen attentively to protracted oral arguments, will diligently read monumental briefs, will spend precious hours in making personal investigations of the evidence and the law– and notwithstanding all that, his carefully considered judgment will concur with that

pronounced by the barber, the grocer, and the shoemaker. There is this difference, however: the judge, because of his specialized training, can express the rationale of the decision in profound language that fits into the juristic scheme. An unfair analogy would be the witch doctor who may produce cures without knowing why, and the highly skilled medical expert who cures, but can also give a scientific explanation—or, at least, something that sounds like one. A plausible theory is that every human being considers himself an amateur judge; when a judge turns professional, his judgments acquire sanctions, but his thinking habits fortunately remain those of the amateur. That may be why judges are seldom priggish enough to carry judicial integrity to the point of national catastrophe. Moreover, if a judge violates the commonly accepted concepts of justice in the community, the legislature or successor judges will ultimely restore judicial thought into harmony with community thought.

Facts have an innate faculty of looking different in different lights. It is the function of a brief to present the facts in the most favorable light, but that does not sanction distortion, suppression, or expansion. Skillful lighting requires intimate knowledge of every detail of the subject, plus some aptitude for appraising relative values and creating harmonious arrangements. The difference between the unflattering likeness produced by a snap shooting amateur and the artistic personality study produced by a renowned portrait photographer is largely a matter of posing, lighting, and finishing. The brief writer, to be sure, must use words while the photographer uses light, but the basic objective is the same: selling a picture.

The presentation of facts in a brief must of necessity be quite different from the presentation in the opinion. In a brief absolute honesty is mandatory; judicial license permits such variations in the facts as are essential to a well-considered, sagacious opinion. *Richard III* would have been poor drama if Shakespeare had adhered to history; and many outstanding judicial opinions owe their status to artistic factual modifications. Lawyers sometimes are disappointed at their inability to recognize the facts as they appear in the opinion; but they should realize that the *decision* would have been precisely the same even if the facts as stated in the *opinion* had retained their old familiar looks.

Adroitness in the presentation of facts has one objective: to facilitate perception of the imperative dictates of justice for a favorable decision. To stimulate the judge's perceptivity, invocation must be made to common sense, ideals, predelictions, and vanity. The appeal to common sense is ordinarily the most efficacious, for presumably both judge and lawyer have unlimited supplies of that rare treasure, and both have the variety indigenous to the community. The good judge, of course, is the one most generously endowed with the highest grade of common sense; and the difference between a good judge and an outstanding judge is literary rather than juristic. The appeal to ideas has an element of danger, for most people have internal as well as external ideals, and obeisance to the external ideal may infuriate the internal ideal. All people have those unexplainable, unintentional, illogical likes and dislikes that qualify as prejudices—all people, that is, except judges, and they have predelictions. It is wise, therefore, not to use arguments that might bounce against some of the judge's petrified notions; better stick to morality, patriotism, humanitarianism, and the public weal. Vanity, that essential of human happiness, has been the victim of undeserved deprecation. In judges, particularly, vanity is a truly precious quality, for vanity is the most effective preventative of judicial tyranny. No matter how overdeveloped his urge toward absolutism may become, a judge still retains his positional vanity; he craves universal recognition as a great jurist—the *greatest* jurist, in fact—and this craving fortunately imposes some degree of self-restraint. If a judge's vanity has a voracious appetite for flattery, the type that needs a double shot of flattery before breakfast, and double shots at frequent intervals throughout the day, the brief should be drenched with flattery; if, on the other hand, only small quantities are appreciated, and then only if highly diluted, the brief should be only faintly perfumed with thoroughly disguised flattery.

There are some types of flattery that add a pleasant glow to a brief, and they are deference, thoughtfulness, and consideration. Every judge is entitled to these, not always because of his character, or erudition, or diligence, or amiability, but always, *always* because of his position. The

judge should be treated like visiting royalty, not like a recalcitrant elephant. His attention should be *invited*, not *called* or *directed*. And judges should never be *admonished* to read this or that *carefully*, or to pay *particular attention* to something or other. Judges always read carefully and always pay particular attention to everything—and for a lawyer to intimate otherwise is downright uncouth. Besides, in most cases where the intimation is justified, it won't do any good. While courtesy is not generally a satisfactory substitute for a valid argument, sometimes it seems to come amazingly close; flattery comes even closer.

It must be disconcerting for a judge to read a brief which consists primarily of the lawyer's pendente lite credo. After all, it really doesn't matter what the lawyer believes the law to be; the important thing is what the judge believes. Still, briefs are frequently littered with "We believe so and and so," "We are of the opinion," and "It seems to us." A brief should *submit*, *contend*, or *urge* various arguments for the judge's consideration; and the gratuitous, personal views of the writer should not be volunteered without an express invitation – preferably engraved – from the judge.

Solicitude for a judge's welfare should be shown, not expressed. If, for example, guiding signs placed at strategic spots throughout the brief would facilitate reading and comprehension, signs should be installed. Not exactly the same kind of signs used on highways, to be sure, although some of those signs have possibilities of adaptation, *viz.*, "Winding argument ahead," or "Muddy when wet or dry," or "Unreadable until repaired." Much more dignified, and probably better, than the highway type of signs are synopsis-of-synopsis headings – headings that trenchantly state the essentials of the argument, both factual and legal. Headings that simply enumerate, or vaguely refer to some fact or argument, or just mumble in type, should be eschewed; the headings should actually *tell* something to the judge. By way of illustration, a heading like "Accident occurred," is neither as impressive nor as tragically revealing as "Piano fell on Joe's head."[9] And arguments and authorities clustered under the heading "Law involved," are certainly not as effectively heralded into the judge's consciousness as the same law arguments and authorities introduced with the heading "Contracts must have mutuality." If a headline-reading judge reads nothing but the headings, he should acquire a conversational knowledge of the case; the judge who habitually skips headlines will get the full story in the body of the brief; and for the judge who reads everything in the brief —and there are such judges, it is said—the headings will differentiate the highly important portions of the brief from the mildly important. The headings also magnanimously drop hints as to what portions of the brief may be skipped. After all, if a judge is already convinced of the soundness of an argument, why waste time reading pages and pages of brief seeking to convince him? Besides, there is always the danger that reading might unconvince him.

Authorities and precedents frequently are very persuasive in briefs, but only when they have been carefully selected and properly distributed. Before precedents can be selected, they must be discovered. Sometimes lawyers, failing to appreciate the coyness of precedents, expect them to flutter into sight at the opening of a book without any necessity for flushing out of their hiding place. Search should start in the digests—especially the local digests—for no matter what some impatient lawyers may proclaim, digests attempt to make the finding of law easy, not difficult or impossible. A hunter does not look only in one spot for the hypothetical pheasant; he looks in many likely spots, sometimes hour after hour, until he finds a real pheasant. Precedent hunters should follow the tactics of the pheasant hunters.[10]

Precedents should not be selected for inclusion in briefs solely on their intrinsic worth; the judge must also be considered in making the choice. Naturally every judge considers his former opinions the most persuasive, the most perspicacious, the most authoritative, and these opinions have top priority. Secondary precedents should include the opinion which most accurately expresses the principle sought to be established (for clarity), the opinion in which the principle was first enunciated (for venerability) and the

[9]Note omission of interesting details, like piano was a Steinway, Joe's head formerly was curly, etc.

[10]The gun, of course, should be omitted; however, since excellent briefs usually result from "working like a dog," possibly the dog should be retained.

opinion which last announced the doctrine (for up-to-dateness). One precedent which should be included, if at all possible, is the one with the greatest vulnerability to discovery by the judge on a research expedition: judge-discovered precedents acquire exaggerated importance, notwithstanding their prior careful appraisal and rejection by the attorney preparing the brief;[11] and the only way to hold those cases down to their appropriately humble position is to cite them.

The selection of supportive arguments is infinitely less important than the selection of persuasive arguments; still, judges appraise the merit of the brief almost entirely upon the supportive arguments presented. And this is entirely proper, for a truly skillful brief never lets the judge suspect that any persuasive arguments in the brief had the slightest influence on his decision. As to the supportive arguments—well, we all recognize instantaneously the supreme sagacity of the person who expresses ideas identical with ours. When the judge reaches a determination, why shouldn't he think highly of the brief which furnishes ready-to-use precedents and arguments that can be incorporated into his opinion?

Supportive arguments and precedents should have versatility, flexibility, tensibility—in short, capacity for being fitted into place for the production of a scholarly opinion. Precedents rich in generalizations are especially prized, as are those in which flickering ideas are expressed in putty words. And dicta—juridical small talk about questions not presented—should never be overlooked! While fluent judges sometimes seem to pad their opinions with discourses on divers interesting but irrelevant subjects,[12] their dicta are really useful because of availability as synthetic substitutes for authentic precedents. Of course, if the controversy involved requires an opinion different from that previously gratuitously expressed, no harm will be done, because the court can always say, "That was mere dictum!"

The character of the supportive precedential material to be placed in any brief is dependent upon the nature and type—not to mention vagaries—of the judge who is supposed to read the brief. The general principles involved are illustrated by considering a few types of judges not picked at random: If the judge is the treatise-writing type, supply him with a superabundance of cases, plus references to notes, annotations, law review articles, and texts where he can find additional cases. Cases should not be analyzed or collated, for that would constitute usurpation of the judge's prerogatives; and infinite care must be taken not to suggest that for hundreds, probably thousands, of years, judges have been writing definitive opinions—with obsolescence starting before the writing of the long last paragraph. If, by way of contrast, the judge is the overworked type,[13] present him with a few sentences and paragraphs that he can stick together with a few of his own adhesive words to create his opinion before he dashes out in search of needed recreation, such as eating, drinking, fishing, or golfing. If the judge is the juristic type, simply use discrimination in selecting terse, meaty quotations—with all of the fat carefully trimmed away—from a few of the best reasoned cases on the subject.

One essential ingredient of all good briefs eludes accurate denomination—*craftmanship* comes close, so does *artistry*, and even *class* or *finish* might do. It approximates the ingredient which sets apart the amazingly expensive tailored suit from the amazingly cheap hand-me-down. Now, while handmade buttonholes are unnecessary to indicate superior workmanship in a brief, some equivalent details of distinction are: all quotations compared with the originals, with paragraphing and omissions indicated; all cases thoroughly Shepardized; all references to cases and testimony checked for accuracy; correct citations supplied for all cases which in the process of quotations have been denuded of all identifying marks except the exasperating *supra;* the year of decision always given; the same style of citing cases used throughout the brief; all repetitious, useless, or obstructive material deleted. If the rules require printed briefs but tolerate sham printing, submit genuine printing—not because of the shaggy, unkempt appearance of the crudely imitative printing processes, but because sham printing

[11]The same phenomenon, undoubtedly, that makes the fish we catch at least twice as large as fish of the same size caught by somebody else.

[12]If every judge were required to pay out of his own pocket the cost of typing, printing and distributing his opinions, it is doubtful that there would be any substantial decrease in the total volume of opinions.

[13]Judges are never lazy; if occasionally they have that appearance, they are merely exhibiting some of the atypical symptoms of overwork.

processes do not permit the scrutinizing of galley or page proof,[11] with the result that errors which escape detection in the typewritten page appear vulgarly conspicuous in the printed page.

Possibly a client cannot afford to pay for the time and effort essential to a workmanlike brief, but this much is certain: no lawyer can afford to present a cut-rate brief to any court! The shoddiness of a cut-rate brief insults the court, degrades the lawyer. Briefs are essential expedients of our judicial system; they are submitted by attorneys, not only as lawyers for litigants, but also as officers of the court. Just as a reputable surgeon will not perform any operation in a hurried, slipshod manner merely because of the patient's inability to pay, a reputable lawyer will not submit a brief that is below his highest professional standards, regardless of the prospect of inadequate remuneration. In neither case is justifiable pride of profession the fundamental motivating force; in both cases the impulsion is a profound sense of obligation to humanity.

[11]Failure of a lawyer to check the galley or page proof with painstaking care should not be made a prison offense; two hours in stocks (if available) should be adequate, especially since the dereliction usually inflicts its own punishment.

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Validity of Covenant Contained in Lease, That the Landlord Will Not Be Liable for Acts of Non-feasance

VANCE V. VAUGHAN*
Brentwood, Maryland

1. In general, a contractual covenant limiting the liability of one of the parties for the consequences of his own negligence is not void for reasons of public policy. *Kirshenbaum v. General Outdoor Advertising Co.,* 258 N.Y.489, 180 N.E. 245 (1932) (Court upheld covenant exempting landlord from liability for damages resulting from leakage); Prosser, "Torts," 380, 381; Notes, 84 A.L.R. 657 and 175 A.L.R. 8. However, such covenants are strictly construed against the exempted party; so that a covenant against liability for wear and tear, inherent defects, and damage by the elements has been held not applicable to damage caused by a leaky roof of which the landlord had notice. *Drescher Rothberger Company v. Landeker,* 140 N.Y. Supp. 1025 (1913).

2. In Maryland, a covenant against liability for one's own negligence is generally enforceable; but it will not be applied to relieve a party from liability resulting from gross negligence, wilful misconduct, or bad faith. Thus, under article 26, section 117 of the Code of 1860, a telegraph company might, by its own rules, refuse liability for failure to deliver a broker's "unrepeated" message directing an associate to purchase gold, there being no showing of gross negligence, wilful misconduct, or bad faith. *U. S. Telegraph Company v. Gildersleeve,* 29 Md. 232 (1868); *Birney v. Telegraph Company,* 18 Md. 356 (1862); or from responsibility for defaults beyond its own lines, *Greer v. Western Union,* 143 Md. 675, 123 Atl. 447 (1923). By chapter 471, section 133, Code of 1868 (article 23, section 296, Code of 1951), the legislature repudiated the policy underlying the *Gildersleeve* case, requiring telegraph companies to accept a limited degree of liability for failure to transmit dispatches in the order in which received, with impartiality and good faith (present penalty—$100, and costs, payable to the sender). See *Chesapeake, etc., Telephone Co. v. Baltimore, etc. Telegraph Co.,* 66 Md. 410, 7 Atl. 809 (1887). However, in *Primrose v. Western Union,* 154 U.S. 1 (Penna. 1893), the common law principle announced in the *Gildersleeve* case was followed by the supreme court.

Common carriers are in a class by themselves, because they are deemed insurers of the persons and goods they transport. They cannot, by contract, "restrict, diminish, or limit that obligation to the public, or that duty to the passenger which requires the exercise of the highest degree of care and diligence." Such a contract would be utterly void. *Birney v. Telegraph Company, supra.* However, there is no public policy which would preclude a common carrier from entering into a contract of insurance indemnifying it against liability for injuries to passengers and employees, as there is no reason to believe that this would tend to relax the carrier's vigilance. *The American Casualty Insurance Company's Case,* 82 Md. 535, 577ff. (1896).

That a covenant contained in a lease, exempting the landlord from liability for damages to the tenant by reason of negligent maintenance, would be valid, was implied in *Kinnier v. Adams,* 142 Md. 306 (1923) (Deletion of such clause before execution of lease was held to have obsolved tenant from any responsibility for care of pipes under control of landlord). In this case, the court cited 1 Tiffany, "Landlord and Tenant", 641-646 as follows:

> "Occasionally there is an express provision in the lease affecting the landlord's liability for the flooding of the leased premises. A provision that the lessors are not liable for damage caused by the leakage or bursting of water pipes in a part of the building not leased, this clause being, in view of other clauses, superfluous if construed as applying only to leakage or bursting on the demised premises."

A clause exempting a land lord from liability for the condition of his premises was impliedly upheld in *State of Mary-*

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land for Use of Pumphrey v. Manor Real Estate & Trust Co., et al., 176 F 2d 414 (C. A., 4th Cir. 1949). There, the co-defendant Trust Company had leased to the United States certain houses upon the condition that the Trust Company should not be liable for the condition of the premises. Due to antiquated construction, the houses were infested with diseased rats. The United States subleased one of the houses to Pumphrey, who contracted typhus fever and died. In dismissing an action by his widow, as against the Trust Company, the court founded its decision on dual grounds – first, the virtual abandonment by the plaintiff of that portion of her action which affected the Trust Company, and second, the existence of the covenant, exempting the Trust Company. (Shepardized w/o result)

Cases from other jurisdictions upholding a party's right to covenant against the results of his own ordinary negligence include: *Manhattan Co. v. Goldberg,* 38 A, 2d 172 (D.C. Mun. App. 1944) (Laundry may limit its libaility by statement printed on claim check issued at time clothing is received. *Pennsylvania Greyhound Lines v. Wells,* 41 A. 2d 837 (D. C. Mun App, 1945) (Covenant against Liability for loss of baggage). *Griffiths v. Broderick, Inc.,* 27 Wash. 2d 901, 182 P. 2d 18 (1947) (Tenant, injured by defective stairway, recovered from owner. Owner could not recover over from property management agent, because of covenant in their contract exempting latter from such liability). *Barclay, Inc., v. Maxfield,* 48 A. 2d 768 (D. C. Mun. App. 1946) (Lease of apartment provided use of storage facilities was without consideration and revocable at will and that landlord would not be liable for loss of anything stored there.)

The note in 175 A.L.R. 8, at 92, notes a current tendency toward statutes declaring covenants exempting landlords from liability against public policy, because of the present inequality of bargaining power between landlord and tenant. Several New York cases are cited.

Recent Maryland Case. *Baird v. Telephone Co.,* 117-A2nd 873 decided by Maryland Court of Appeals, November 9, 1955. Telephone company had contract with Baird for advertising in telephone directory and failed to list his name. The court restricted recovery to an amount not exceeding the amount of advertising charge, as provided by the limitation clause in the contract with the company and subscribers.

CONCLUSION:

A landlord, unlike a common carrier or a telegraph company, is not engaged in an activity affected by a public interest. He is therefore bound to exercise only ordinary care in the maintenance of the "common" areas of the leased premises. While Maryland will not permit a party to contract away his duty to use extreme care, or his liability for the results of his own gross negligence, intentional misfeasance, or bad faith, its courts and legislature have announced no general public policy which would invalidate a covenant freely entered into by the parties to a lease, releasing the landlord from liability for faiure to use ordinary care in maintenance of the leased premises.

Where such a agreement exists, in order to recover from the landlord, the injured tenant has the burden of proving that his injuries resulted from gross negligence, intentional misfeasance, or bad faith on the part of the landlord.

Hypothetical Questions on Cross-Examination

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THE RULE is well established that on direct examination hypothetical questions propounded to expert witnesses must be based on testimony or evidence already presented in the case.[1] Hypothetical questions on cross-examination, however, frequently present an unusual and difficult problem, where the defendant wishes to interrogate plaintiff's expert witness by propounding hypothetical questions predicated upon his version of the evidence. No definite rule has been established as to what criteria or standards should be used to determine the proper scope of such questions on cross-examination. This problem is of special importance where a plaintiff calls an expert witness to answer hypothetical questions based on his version of the facts and the defendant desires to propound questions based upon his own version of the facts which he later plans to introduce. Should he be permitted to frame a question based on evidence or testimony which he will later introduce or should he be required to wait until he has concluded his case and then recall the expert as his own witness? Obviously, the latter alternative would be unduly burdensome, impractical and expensive. The precise question has been presented in only a few reported cases and, although it is conceded that upon cross-examination of an expert witness any fact which, in the sound discretion of the court, is pertinent to the inquiry, whether testified to by any one or not, may be assumed in a hypothetical question *with the view of testing the skill, learning or accuracy of the expert, or to ascertain the reasonableness or expose the unreasonable of his opinion,*[2] no general rule has been established which permits one to propound hypothetical questions predicated upon evidence which he later plans to introduce. Many defendants' attorneys, recognizing the rule as to the scope of hypothetical questions on direct examination do not appreciate the possibilities of examining a plaintiff's expert witness predicated on hypothetical questions based on their own version of the evidence. In modern practice, many defendants' attorneys avoid cross examination of expert witnesses called by a plaintiff because it is usually most difficult to elicit any favorable testimony and especially difficult to discredit an expert witness. This is especially true when an expert is selected by a plaintiff for the purpose of establishing a particular proposition. Examining an expert witness based on the defendant's version of the facts presents an opportunity either to disclose the bias or prejudice of the expert witness, or to elicit opinion testimony favorable to the defendant.

Most authorities and writers recognize that it is a matter of sound judicial discretion of the trial court to determine the scope of cross-examination and, although they recognize that more latitude should be given on cross-examination, they have not recognized the principle that a hypothetical question may be based upon a party's version of the facts not yet introduced into evidence. The question was presented in *Levine v. Barry, et al.,* (1921), 114 Wash. 623, 195 Pac. 1003, wherein the court said:

> "We think it should at once be conceded that the proper rule is that hypothetical questions propounded on direct examination should be based upon the testimony in the case. But cross-examination should not be so limited. The plaintiff here had shown the amount of his services and the circumstances under which they had been performed, but the defendant had not reached his part of the case, and had not had an opportunity to present his version of the facts. To

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[1] *Hayden v. Loffler,* (1909) 212 U.S. 397, 20 S. Ct. 351, 53 L. Ed. 568.

Henkel v. Varner, (1943), 3 Cir., 138 F. 2d 934, 78 U. S. App. D. C. 197.

[2] II Wigmore, Evidence, (3rd Ed., Sec. 684;) *Livingstone v. City of New Haven,* (1939), 125 Conn. 123, 3 A. 2d. 836.

say that under these circumstances the defendant could cross-examine plaintiff's expert witness only upon the facts as produced by the plaintiff would be, in nine cases out of ten, to deprive him of the benefits of cross-examination, because, usually, the defendant will concede the correctness of the answer of the expert witness, based upon the plaintiff's version of the facts.

"It is our view that the cross-examiner may rightfully propound hypothetical questions based entirely on the conjectural facts for the purpose of testing the skill and knowledge of the witness, and, where he has not had an opportunity to present his proof as to the facts, his hypothetical question may be based on his contention of what the facts will be as they may be developed later by his testimony, for the purpose of throwing light on the facts as they may ultimately be submitted to the jury. The privilege of such character of cross-examination is a right which does not rest in the discretion of the court; but the extent to which such cross-examination shall go does rest in the discretion of the court. The purpose of the cross-examination is not only to try to break down or weaken the testimony favorable to the other party, but also to bring out independent facts and admissions which may be of substantial benefit to the cross-examiner."

Another case in which the precise question was presented is *Proechel v. United States*, (1932), 59 F. 2d 648. In that case the court said:

"At the time the question was put, there had as yet been no testimony of the facts assumed. If the facts assumed were supplied by later testimony, as at the time was promised, then it is admitted in plaintiff's brief there was no error in overruling the objection. It is said now, however, that the facts assumed never were put in evidence. But an examination of the record discloses that there was later testimony to each of the facts assumed."

The statements in these cases are based on sound reasoning and should be recognized as the accepted rule. Of course, as stated in the *Levine* case, the extent to which such cross-examination should go is properly a matter within the discretion of the trial judge.

A general statement is made in 11 R.C.L. 585 that,

"Generally, the evidential facts should precede the putting of the hypothetical question. But this rule will not be applied so rigidly as to exclude a deposition taken before the trial, if the assumed facts have been proved before it is offered in evidence. The Court in its discretion may permit the question to anticipate proof of some of the facts, relying on the assurance of counsel that they will be proved later. In such a case, if the supporting evidence is not afterward given, the court should instruct the jury to disregard the opinion. Where expert testimony is offered by way of answers to hypothetical questions, much must be left to the discretion of the presiding judge. The jury are instructed to disregard the answers, unless they find the facts as assumed in the questions; but, as it cannot be known in advance what may be ultimate decision of the jury as to the facts in dispute, the usual practice is to allow counsel, in framing a hypothetical question, to assume the existence of such facts and conditions as the jury may have a right to find upon the evidence as it then is, or as there may be fair reason to suppose it may thereafter appear to be; and, in determining whether a hypothetical question shall be allowed; the judge in many cases must rely to a great extent upon the good faith of counsel in their statements as to what they expect the evidence will be."

It seems clear that a recognition of this rule and its proper application by the courts would result in a more economical, expeditious and equitable trial procedure, especially if attorneys exercise good faith in its application as is contemplated by the rule.

Products Liability Insurance*

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PRODUCTS liability insurance has only recently come of age. It was but cautiously and hesitantly written shortly before the mid twenties as the result of demands for protection by manufacturers who wanted to retire from their former status as self-insurers.[1] One of the policies which provide for products liability coverage is the Comprehensive Liability Policy, now approximately in its sixteenth year.

A modern day economy largely dependent upon automation has made it imperative for individuals and corporations to obtain adequate insurance protection against claims for damages growing out of the use of the products which they manufacture and sell. Insurance, both as to amount and extent of coverage, adequate ten years ago, will not provide sufficient protection in these days of spiraling costs and increasingly large jury verdicts. The coverage afforded by an insurance policy has always been a matter of concern to the defense lawyer. Now, it is a matter of greater importance to management and its counsel to determine the necessary coverage before any accident or catastrophe occurs.

Because of the format of the insurance policies themselves and the necessity in many cases for endorsements, the impression has been created among the members of the bar, and unfortunately among the members of the bench, that a products liability policy is comprehensible only by experts. The Circuit Court of Appeals for the 7th Circuit focused attention on the problem of interpretation of a products liability insurance policy when it said in a 1955 decision:[2]

> The true meaning of the policy is difficult to determine. An examination of it involves a physical effort of no mean proportions. Starting out with three printed pages, the first of which consists largely of a form which is filled in on a typewriter, the reader is confronted also with six physically attached supplements, or riders, inconveniently assorted into different sizes. If he is possessed of reasonable physical dexterity, coupled with average mental capacity, he may then attempt to integrate and harmonize the dubious meanings to be found in this not inconsiderable package. A confused attempt to set forth an insuring agreement is later assailed by such a bewildering array of exclusions, definitions and conditions, that the result is confounding almost to the point of untelligibleness. [*sic*] To describe the policy as ambiguous is a substantial understatement. . . . Guided by these rules, it might reasonably be claimed that there emerges through the confusing language and the shapeless masses of words before us, an intention to protect Aconomy from the commonplace risks incidental to the business of a construction contractor. . . .

The remarks of Judge Schnackenberg emphasize the duty of the insurance bar, trial counsel and house counsel alike, to describe the products liability coverage in terms readily understood by those who are not specialists in the insurance field. In this article, we shall attempt to outline the salient features of a products liability policy, leaving to others the task of providing the details. We shall continually attempt to be objective, bearing in mind the statement recently made by an eminent authority in the insurance field that "policy questions are tiresome."[3] But whether tiresome or not, as this authority has stated, defense attorneys and house counsel owe it to the people they represent to recognize policy coverage questions and to see to it that their clients secure and pay for the coverage they need.

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[1]Miller, *Liability of a Manufacturer for Harm Done By a Product*, PROC. AM. B. ASS'N., Section of Insurance Law 67, 75 (1951).

[2]Ocean Accident & Guarantee Corp. v. Aconomy Erectors, 224 F.2d 242, 247 (7th Cir. 1955).

[3]Risjord, *Underwriting Intent*, 7 FEDERATION OF INS. COUNSEL J. 41 (1940).

Types of Insurance Policies Providing Products Liability Coverage

At the threshold of our study of products liability coverage in an insurance policy, the first question which arises is: In what type of insurance policy will we find products liability coverage provided? In general, there are five types of insurance policies which provide products liability coverage: Comprehensive Liability policies; Manufacturers' and Contractors' Liability policies; Owners', Landlords' and Tenants' policies; Schedule Liability policies; and Garage Liability policies. There is, in addition, a special policy covering products liability of a druggist. This policy we will discuss later under a different heading.

The Comprehensive General Liability Policy has been drafted to provide coverage generally for all risks except where coverage is excluded. Coverage is usually provided under the title "Insuring Agreements". Ordinarily, coverage A of the insuring agreements obligates the insurance company to pay the sums which the insured shall become liable to pay as damages because of bodily injury, sickness or disease sustained by any person. Coverage B of the insuring agreements ordinarily obligates the insurance company to pay the sums which the insured shall become liable to pay as damages because of injury to or destruction of property.

The Manufacturers' and Contractors' Liability Policy, the Owners', Landlords' and Tenants' Policy, and the Schedule Liability Policy contain coverage provisions similar to coverages A and B under the General Comprehensive Policy, but conclude the coverage provisions with the words "arising out of the hazards hereinafter defined." In these three policies the hazards are usually defined in the main body of the insurance policy as a part of the insuring agreements. These provisions may be contrasted with the provisions of some forms of Druggists' policies which, in the first item of the insuring agreements, insures against bodily injury, sickness, disease or injury to property, all in one paragraph.

In the General Comprehensive Liability policies, the hazards insured against usually are found in a separate sheet which is sometimes entitled "Declarations". In other policies, the hazards are enumerated in a sheet which contains the name of the insured, and then describes the hazards. The general form of the description of the hazards and amounts of insurance appears in the opinion in *Ocean Accident & Guarantee Corp. v. Aconomy Erectors.*[4] We suggest the use of this form in connection with reading this article in order to provide a clearer understanding of the discussion that follows.

General Coverage Afforded by Insurance Policies Which Insure Against Products Hazards

This article, as the title suggests, deals primarily with products liability insurance. The provisions of such insurance policies, however, are such as to require a brief description of the entire coverage afforded.

The Comprehensive Liability Policy, or General Liability Policy, usually provides coverage for five different hazards. The first hazard insured against is: "Premises-Operations." Usually there is a space for a description of the area embraced within the term "Premises." There is also a space for the applicable rate and the premium to be charged. The second hazard insured against is "Elevators." The third hazard insured against is usually "Independent Contractors." The fourth hazard insured against is "Products," which, in express terms, may contain a statement to include "completed operations." The fifth hazard insured against is "Contracts" or "Contractual."

The first hazard enumerated, "Premises-Operations," indicates the scope of the coverage. It insures against operations conducted upon the premises of the insured which are the premises described in the policy. Where operations are conducted off of the premises owned by the named insured, an appropriate description should be given to indicate the locality or territory where the operations will be conducted.[5]

The second hazard insured against is "Elevators." This coverage applies to injuries or damages caused by the operation of elevators.[6]

The third hazard insured against is "Independent Contractors." The title of this

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[4]224 F.2d 242, 243 (7th Cir. 1955).

[5]Employers' Liability Corp. v. Youghiogheny & O. Coal Co., 214 F.2d 418 (8th Cir. 1954), a case where coal was loaded on a railroad car in Wisconsin and a door of the car fell and injured a person in Minnesota.

[6]Refined Syrups & Sugars Inc. v. Travelers Ins. Co., 136 F.Supp. 907 (S.D.N.Y. 1954).

coverage indicates its scope.[7]

The fourth hazard insures against liability for "Products-Completed Operations." This coverage we will shortly discuss in detail.

The fifth hazard insured against is "Contracts" or "Contractual" as defined. Some policies, such as the Owners', Landlords' and Tenants', and Manufacturers' and Contractors' policies, enumerate the type of agreements included in this hazard: (1) lease of premises; (2) a sidetrack agreement; (3) an elevator or escalator maintenance agreement; (4) an easement agreement in connection with railroad grade crossings; (5) an agreement required by municipal ordinance in connection with work for a municipality.

Some policies, such as Comprehensive policies, do not contain any enumeration of the contracts included under the term "Contractual". Such contracts must be enumerated in an endorsement to the policy.

We refer to contractual coverage because most of the insurance policies which provide coverage for products liability contain a provision that a warranty of goods or products is not a contract within the meaning of the fifth hazard, "Contractual."

Happenings Insured Against by the Products Liability Hazard Provision

It will conduce to clarity and simplification first to consider the happenings which are insured against. Is the coverage of the policy confined to the results of an accident, or does the policy afford coverage for an occurrence?

Most of the insurance policies providing products liability coverage contain the following provisions with reference to bodily injury and property damage:

> Coverage A—to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person caused by accident.
>
> Coverage B—to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

Generally speaking, there is an added phrase, as we have pointed out, following the word "accident" which adds "and arising out of the hazards hereinafter defined."

We shall make no attempt to analyze or reconcile the decisions which have interpreted the word "accident." Two excellent discussions on the subject have appeared recently.[8] There are a few cases which may serve as guide posts in making a detailed study. The majority of the decisions apply the usually accepted meaning of the term "accident", that is, mishap.[9]

In *Cross v. Zurich General Accident and Liability Insurance Corp.*,[10] a window washer spilled hydrofluoric acid on windows of a building while cleaning the windows. The acid etched the windows. The court permitted recovery on the theory that the damage was caused by accident.

In *Beryllium Corp. v. American Mutual Liability Insurance Company*,[11] employees of the corporation had metal particles of beryllium in their clothes. The wives of the employees handled the clothes and particles entered their lungs, causing death. The court held that the deaths were caused by accident.

In *Kuckenberg v. Hartford A & I Company*,[12] a contractor engaged in blasting operations knew that the blasting operations would result in damage to a railroad track. The court held that the damages were not caused by accident.

Some of the recent comprehensive liability policies provide coverage on an occurrence basis. These policies generally take one of two different forms. One type of policy provides coverage on an occurrence basis only for personal injuries or death, but restricts the coverage for property damage to an accident. Other policies provide for coverage on an occurrence basis for both personal injuries and property damages.

Some of the insurance policies, in order

[7] Duke Power Co. v. Indemnity Ins. Co., 229 F.2d 588 (4th Cir. 1956).

[8] *Report of Casualty Committee, International Association of Insurance Counsel*, 23 INS. COUNSEL J. 33 (1956); Wheeler, *"Caused by Accident" as Used in Comprehensive Liability Policies*, 1956 INS. L.J. 87.

[9] George W. Deer & Son v. Employers Indemnity Corp., 77 F.2d 175 (7th Cir. 1935).

[10] 184 F.2d 609 (7th Cir. 1950).

[11] 223 F.2d 71 (3rd Cir. 1955).

[12] 226 F.2d 225 (9th Cir. 1955). See Annot., 166 A.L.R. 469 (1947).

to provide coverage on an occurrence basis, simply omit the words "caused by accident" in the A and B coverage provisions. Many of the policies affording coverage on an occurrence basis substitute the word "occurrence" in various parts of the policy instead of the words "caused by accident". With the exception of an endorsement, which we will shortly discuss, all of the policies which we have examined restrict coverage for the products hazard to damages caused by accident.

None of the policies which we have seen define the term "occurrence" with the exception of the policies issued by one company to which an endorsement is attached. The endorsement provides that the words "caused by accident" as used in the policy shall be deleted, and the word "occurrence" shall be substituted for the word "accident" wherever else it appears in the policy. The word "occurrence" is defined in the endorsement to

> mean either an accident or a continuous repeated exposure to any condition resulting in an injury during the policy period, except exposure to a condition created, induced or allowed to exist by the insured after it is evident that bodily injury, sickness, disease or death may result from continued exposure to such condition.[12]

We think that the language used in this endorsement might well constitute a definition of the term "occurrence". A similar definition is contained in the Louisiana standard endorsement.[14]

We shall not attempt to muddy the waters by proposing a definition of the word "occurrence." We do suggest, however, that where a contractor knows that blasting operations will damage a railroad track, an insurance company which insures against damage caused by an occurrence does not provide coverage by its policy.[15] We are further of the view that where a land owner constructs a building partially on his neighbors land, the insurance company which issued a policy covering an "occurrence" should not be liable in a mandatory injunction action to remove the encroachment.[16]

The General Scope of the Coverage Afforded by the Products Hazard Provision

Most of the insurance policies which provide coverage for products liability hazards read in part as follows:

Products Hazard. The terms 'products hazard' means

> (1) goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, if the accident occurs after possession of such goods or products has been relinquished to o t h e r s by the named insured or by others trading under his name and if such accident occurs away from premises owned, rented or controlled by the named insured or on premses for which the classification stated in division (a) of the declarations excludes any part of the foregoing; provided, s u c h goods or products shall be deemed to include any container thereof, other than a vehicle, but shall not include any vending machine or any property, other than such container, rented to or located for use of others but not sold;
>
> (2) operations, if the accident occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the named insured; provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to an agreement; provided further, the following shall not be deemed to be 'operations' within the meaning of this paragraph: (a) pick-up or delivery, except from or onto a railroad car, (b) the maintenance of vehicles owned or used by or in behalf of the insured, (c) the existence of tools, uninstalled equipment and aban-

[12]The endorsement further provides that such injury, sickness, disease or death caused by continuous or repeated exposure to substantially the same conditions shall be deemed to result from one occurrence, and, subject to the "each person" limit, the "each accident" limit of bodily injury liability shall apply.

[13]Snow, *Occurrence Against Accident—Just What Is Covered*, 21 Ins. Counsel J. 30, 37 (1954). The author calls attention, at page 37, to the view of the National Bureau of Casualty Underwriters on the scope of the word "occurrence".

[15]Kuckenberg v. Hartford A. & I. Company, 226 F.2d 225 (9th Cir. 1955).

[16]Hardware Mutual Casualty Co. v. Gerrits, 65 So.2d 69 (Fla. 1953); Aetna Casualty & Surety Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955); Desrochers v. New York Casualty Co., 99 N.H. 129, 106 A.2d 196 (1954)

doned or unused materials and (d) operations for which the classification stated in division (a) of the declarations specifically includes completed operations.

Some policies provide coverage for goods or products manufactured in the form of the provisions in the policy involved in *Ocean Accident & Guarantee Corp. v. Aconomy Erectors.*[17] The insuring provision in a typical Druggists' Policy provides for products liability in somewhat different language.[18]

Some policies, particularly Owners', Landlords' and Tenants' policies, contain a provision insuring premises alienated by the named insured, after he relinquishes possession, provided the premises were not constructed by the named insured for the purposes of sale. These coverages we will deal with briefly in a later subdivision of this article.

We will now proceed to discuss the two main subdivisions of the products liability coverage in the order in which they appear in the policies.

The Scope of Coverage Afforded by The Products Hazard Provision As It Applies To Goods and Products

(1) The term "products hazard" applies in the first place, to goods or products manufactured, sold, handled or distributed by the named insured. If such goods cause injuries or damages, the insured is protected. It is important to remember, however, that the goods themselves are not covered by the insurance policy.

The term "handled" as used in the policy provision has given rise to some difficulty. In *Employers Mutual Liability Insurance Company v. Underwriters at Lloyd's,*[19] the insured negligently loaded a freight car with rolls of paper. The truck driver unloading the freight car was killed by the roll of paper. The court held that the roll of paper was handled by the insured and permitted recovery under the policy.

In *Selective Logging Company v. General Casualty Company,*[20] the insured company, which was in the logging business, loaded logs belonging to a plywood company onto a railroad car. The car was then moved several hundred yards from the insured's premises. While the car was not in motion, the logs rolled off, striking and killing a railroad brakeman. A wrongful death action was commenced by the representatives of the brakeman against the railroad, which filed a third-party complaint against the insured. The insured was charged with negligent loading of the logs and indemnity was sought for all damages which might be allowed against the railroad. The defense of the third-party action was tendered to the insurer which denied liability.

The insured settled the action against it and brought an action against the insurer to recover the amount of the settlement and attorney's fees. The trial court entered judgment dismissing the action upon the ground that the insured handled the logs within the meaning of an exclusionary endorsement that the policy did not apply to liability arising out of handling any article or product. Upon appeal, the Supreme Court reversed the decision of the trial court. The court held that transportation of the logs did not constitute handling.

In *Liberty Mutual Insurance Company v. Hercules Powder Co.,*[21] the court held that an aluminum tube which Hercules had purchased and had modified by squaring the ends and plugging them, which the company used for experimental purposes, and which exploded and caused deaths, injuries and property damage while being worked on by another company off the premises of Hercules, was not within the term "goods handled by named insured" in an exclusion clause in a general liability policy. The court cited a number of cases holding that products were handled within the meaning of the products liability provision.

(2) Products liability coverage applies only after possession has been relinquished. For example, a grocery store sells a case of soda pop to a customer. The grocer carries the soda pop toward the automobile

[17]224 F.2d 242 (7th Cir. 1955).

[18]To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or injury to or destruction of property, including the loss of use thereof, arising out of the handling or use of or the existence of any condition in drugs, medicines, or other goods and products prepared, sold, handled or distributed by the named insured at or from the premises if the injury occurs after the named insured has relinquished possession thereof to others.

[19]177 F.2d 249 (7th Cir. 1949).

[20]301 P.2d 535 (Wash. 1956).

[21]224 F.2d 293 (3d Cir. 1955).

of the purchaser. The soda pop explodes and causes personal injuries and property damage. The grocer's products liability policy does not apply because the grocer has not relinquished possession of the soda pop which caused the damage.

(3) The products liability coverage applies only where the accident or occurrence happens away from the premises described in the policy. Not only must the accident or occurrence happen after possession is relinquished, but the accident or occurrence must take place off the premises of the insured. Pursuing our soda pop example one step further, suppose the grocer relinquishes possession of the soda pop to the customer, but before the customer leaves the grocer's premises, the soda pop bottle explodes. There is no coverage under the products liability provision because the accident or occurrence did not take place off the premises of the insured.

A caveat at this point is in order. Every insured should make it a point to examine his liability policies to be sure that his premises-operations and products liability coverages have been provided by the same insurance company. If he has premises-operations coverage in one company and products liability in another company, he may find himself a participant in a dispute between the two insurance companies, each of which contend that the other is liable.

The Druggists' Policy, in contrast with the other liability policies, provides for coverage to the druggist after he relinquishes possession of the article, whether the accident or occurrence takes place upon his premises or off the premises.

(4) Products liability coverage applies to the container of the goods, provided the container is not a vehicle. Referring again to our case of soda pop as an example, injuries or damages inflicted by the case itself, as distinguished from the bottles in the case, are covered by the products liability provision. If, however, a truck in which a load of sugar beets were being transported caused injury or damage, the vehicle itself would not constitute a container.

(5) Products liability coverage does not apply to vending machines or other property, other than a container, rented to or located for use of others but not sold. A manufacturer of vending machines, who does not sell the machines, but rents them or places them for use of others, has no protection under the products liability provision if the machine causes injuries or damages to others. In order to obtain coverage, the manufacturer should secure a vending machine endorsement to his policy.

(6) The goods and products section of the products hazard provision contains an exception to the provision requiring the accident or occurrence to take place away from premises owned, rented or controlled by the named insured. If there is a statement in the premises-operations section of the declarations of the policy that the provisions of the goods and products division of the products hazard liability provision shall not apply to certain premises owned, rented or controlled by the named insured, then if the accident or occurrence takes place on such described premises, there will be coverage afforded.

The Scope of Coverage Afforded By The Products Hazard Provision As It Applies To Completed Operation

(1) Coverage is afforded under the completed operations division of products hazard only where the accident or occurrence takes place after the operations have been completed or abandoned. For example, the insured is a plumber, who is called to a residence to install a lavatory. He completes the work and later, because of his negligence, the lavatory causes property damage. The plumber is covered because the operations have been completed.

A number of interesting questions have arisen in connection with the definition of completed operations. For example, in *Reed Roller Bit Company v. Pacific Employers Insurance Co.*,[22] a salesman sold an abrasive wheel and represented it would work on the employer's machine. While an employee operated the wheel, it disintegrated. Because of the representations made, the court held that the operations had not been completed.

In *Hardware Mutual Casualty Company v. Schantz*,[23] a hoist was being repaired, but actually the repairs had not been entirely completed. The court held that the operations had not been completed.

In *U. S. Sanitary Specialties Corp. v. Globe Indemnity Co.*,[24] a salesman demonstrated wax in a court house. He did not remove the wax. Later, a person in

[22] 198 F.2d 1 (5th Cir. 1952).
[23] 186 F.2d 868 (5th Cir. 1951).
[24] 204 F.2d 774 (7th Cir. 1953).

the court house slipped, fell and was injured. The insurance policy provided coverage for premises-operations, but not for products liability. The court held that the operations had been completed and since there was no coverage for completed operations there could be no recovery under the policy.

(2) Coverage is afforded only where the accident or occurrence takes place away from premises owned, rented or controlled by the named insured. This provision makes the coverage the same with reference to location as coverage for goods and products.

(3) Operations are deemed completed even though the work is improperly or defectively performed and even though further operations are contemplated pursuant to agreement. Referring again to the example involving the plumber, if in addition to putting in a lavatory, the plumber had agreed to put in a bathtub two or three months later, there would still be coverage for the damages caused by the defectively installed lavatory.

(4) The completed operations provision contains a number of exclusions:

(a) pick-up and delivery operations;
(b) maintenance of vehicles;
(c) accidents or occurrences resulting from tools, uninstalled equipment or abandoned or unused equipment.

There is no necessity for further comment with respect to these exclusions.

(5) Completed operations includes pick-up and delivery from or onto a railroad car. We have not been able to determine why such operations constitute completed operations, but the policy provisions are clear that such pick-up and delivery do constitute completed operations.

(6) The policy expressly provides that operations which might otherwise be excluded from the coverage afforded by premises-operations will be included under premises-operations, not under products liability, either on account of the products themselves or completed operations, provided there is an appropriate declaration in the premises-operations provision specifically including such completed operations. This is particularly important where there is no products liability coverage and where there are items which but for the enumeration in the premises-operations provision might be controversial and result in litigation.

The Policy Period And The Territorial Limits Of The Policy

The policy takes effect at 12:01 a.m. Standard Time at the address of the named insured as stated in the policy. The policy applies only to accidents or occurrences which take place during the policy period. It is important for the insured to continue his insurance in force because if the accident or occurrence takes place after the policy has expired, the insured will find himself without coverage.

The policy affords coverage for accidents and occurrences which take place in the United States, its territories or possession, and the Dominion of Canada.

The Extent of Liability Under The Products Liability-Completed Operations Hazard

Most of the insurance policies which afford coverage for products liability-completed operations state the limits of liability in the declarations which, as we have stated before, may appear either in the policy itself or in the declarations or descriptions of hazards listed on a separate sheet and attached to the policy. For example, the policy involved in *Ocean Accident & Guarantee Corp. v. Aconomy Erectors*[25] enumerates the limits under bodily injury liability for each person, each accident and the aggregate products liability. The declarations also enumerate the limits for property damage liability for each accident, for aggregate operations-premises, for aggregate products and for aggregate contractual.

The usual products liability-completed operations policy explains the limits of liability under the caption "Limits of Liability" applied to coverages A and B, and, under the other coverages of the policy in that part of the policy entitled "Conditions".

Most of the products liability-completed operations policies contain the following provision with reference to one lot of goods:

> Under . . . the definition of hazards all damages arising out of one lot of goods or products prepared or acquired by the named insured . . . shall be considered as arising out of one accident,

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[25]224 F.2d 242 (7th Cir. 1955).

and, where the policy affords coverage for an occurrence, the policy reads: "as arising out of one accident or occurrence".

Before the language now used in most of the policies was adopted, there was a question as to what constituted one accident or occurrence. In the now famous case of *St. Paul–Mercury Indemnity Company v. Rutland*,[26] the insured's truck derailed sixteen freight cars belonging to fourteen separate owners. The court held that the collision involved but one accident.

The same principle had been earlier established in *Denham v. La Salle-Madison Hotel Co.*,[27] which involved the La Salle-Madison Hotel fire.

The *Rutland* case was followed in *Tri-State Roofing Company v. New Amsterdam Casualty Company*[28] and in the most recent case of *Truck Insurance Exchange v. Rhode*.[29] In the latter case, the insured operated an automobile which collided with three motorcycles, inflicting serious injuries on the operators of the motorcycles. Upon the authority of the *Rutland* case, the court held that there was but a single accident or occurrence.

Property In The Care, Custody And Control Of The Insured

All of the insurance policies which we have seen, which provide coverage for products liability-completed operations hazards contain a provision excluding coverage for damage to property in the care, custody or control of the insured. A few citations will give a general idea of the interpretation which the courts have applied to this exclusionary provision.

In *Boswell v. Travelers Indemnity Company*,[30] the insured contracted to repair a heat exchange unit which was firmly affixed to the owner's realty. The Manufacturers' and Contractors' Policy covered boiler work by the insured, but excluded the liability of the insured for injury to or destruction of property owned, occupied or used by the insured, and property in the care, custody and control of the insured. A unit was damaged while the insured tested it and the insurance company denied liability under the policy. The court permitted recovery against the insurance company and held that the property damaged was not in the care, custody or control of the insured within the exclusionary provision of the policy.

In *McLouth Steel Corporation v. Mesta Machine Company*,[31] the court held that a machine which was the property of another, and which a sub-contractor's employees were installing, was not property owned, occupied or used by, or in the care, custody or control of, the sub-contractor within the exclusionary clause in a liability policy.

Great American Indemnity Company of New York v. Saltzman[32] was a freak case. There the insured entered a stranger's airplane without permission for the purpose of inspection. In the course of his inspection, the plaintiff started the engine. Because the plaintiff did not know how to apply the brakes, the airplane started to move and crashed into a hanger substantially damaging the airplane. The owner of the airplane brought an action against the insured. The insured tendered the defense to the insurance company which refused to furnish a defense. The insured paid a judgment which the airplane owner secured, and then brought suit against the insurance company. The court held that the airplane was not used by and was not in the care, custody and control of the insured and permitted recovery.

There are, of course, clear-cut cases where property is in the care, custody and control of the insured and where the exclusionary clause clearly applies. Such was the case in *Wyatt v. Wyatt*.[33] In that case, the court held that an automobile loaned to the insured, and which was damaged while the insured used it, was "in charge" of the insured within an exclusionary provision of an automobile policy. There can be no quarrel with this decision.

In *L. L. Jarrell Construction Co. v. Columbia Casualty Company*,[34] however, the court held that a concrete retaining wall ruptured by a bulldozer operated by a general contractor in back filling operations was in the care, custody and control of the general contractor within the meaning of a clause in his liability policy excluding coverage for damage to property in the care, custody or control of the insured. We suggest that the insurance policy did

[26] 225 F.2d 689 (5th Cir. 1955).
[27] 168 F.2d 576 (7th Cir., 1948).
[28] 139 F.Supp. 193, 197 (W.D.Pa. 1955).
[29] 303 P.2d 659 (Wash. 1956).
[30] 38 N.J. Super. 599, 120 A.2d 250 (1956).
[31] 214 F.2d 608 (3rd Cir. 1954).
[32] 213 F.2d 743 (8th Cir. 1954).
[33] 239 Minn. 434, 58 N.W.2d 873 (1953).
[34] 130 F.Supp. 436 (S.D.Ala. 1955).

afford coverage to the same extent as in the *Boswell* and *McLouth Steel Corporation* cases.

How Products Liability Developed

We shall now trace the development of the law imposing liability for damages arising out of the use of goods and products. We shall discuss liability in terms of negligence, misrepresentations, and warranties, and we will also discuss the status of the retailer who sells goods and products in the original package in which he receives them, and which he sells without any inspection.

The history commences with the decision in *Winterbottom v. Wright*.[35] In that case, the court held that the manufacturer, vendor or supplier of a chattel owes the duty of care only to the person or persons with whom he contracts.[36] Text writers generally cite this decision to the point that a manufacturer or vendor sustains no liability for negligence unless the injured party has a contractual relationship with the manufacturer or vendor.[37]

In 1852 occurred the first crack in the manufacturers' defensive wall of lack of privity between the harmed vendee and the manufacturer. In *Thomas v. Winchester*,[38] the defendant had mislabeled a deadly poison. The court permitted recovery by the injured vendee.

In 1903, the Circuit Court of Appeals for the 8th Circuit in *Huset v. J. I. Case Threshing Machine Co.*,[39] speaking through Judge Sanborn, stated that there were three exceptions to the general rule exonerating a manufacturer from liability for harm done by a product:[40]

> The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. . . . The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner. . . . The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. . . .

In the *Huset* case, an employee of a farmer who had purchased a threshing machine from the defendant was injured. The court permitted recovery.[41]

The monumental step in the development of the law occurred in 1916 when Chief Judge Cardozo of the New York Court of Appeals wrote the decision for the court in *MacPherson v. Buick Motor Co.*[42] In that great landmark of the common law, the purchaser of an automobile from a dealer brought suit against a manufacturer for injuries sustained when a defective wheel collapsed. Allowing recovery, the court said:[43]

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.

The latest substantial advance in the history of liability appears in *Carter v. Yardley & Co.*[44] In that case, the defendant sold perfume which caused a rash on the user. The evidence showed that that plaintiff did not have an allergy, and that the perfume had the same effect on other users. The court permitted the plaintiff to recover. The court held that under the decision in the *MacPherson* case, all dangerous things have been brought into the same class as the inherently dangerous things. This is the principle embraced in the Restatement of Torts.[45]

Wisconsin law has developed substantially the same. From an early date, how-

[35]10 M. & W. *109, 152 Eng. Rep. 402 (Ex. 1842). Professor James has made a comprehensive study of the question of products liability in his article *Products Liability*, 34 TEX. L. REV. 44, 192 (1955).

[36]Miller, *Liability of a Manufacturer for Harm Done by a Product*, PROC. AM. B. ASS'N., Section of Insurance Law 67 (1951); BOHLEN, STUDIES IN THE LAW OF TORTS 76-77 (1926). Professor Bohlen characterizes Winterbottom v. Wright as "the much cited and generally misunderstood case."

[37]65 C.J.S., *Negligence* § 100 (1950).

[38]6 N.Y. 397 (1852).

[39]120 Fed. 865, 61 L.R.A. 303 (8th Cir. 1903).

[40]*Id.* at 870-871.

[41]Reynolds, *Products Liability Claims*, 18 INS. COUNSEL J. 151 (1951). Compare Standard Oil Co. v Murray, 119 Fed. 572 (7th Cir. 1902).

[42]217 N.Y. 382, 111 N.E. 1050 (1916).

[43]*Id.* at 389, 111 N.E. at 1053.

[44]319 Mass. 92, 64 N.E.2d 693, 164 A.L.R. 559 (1946). See PROSSER, TORTS § 84 (2d ed. 1955).

[45]Section 395. See Miller, *Manufacturers' Product Liability Re-Visited*, 23 INS. COUNSEL J. 175 (1956).

(Continued on Page 77)

THE ATLAS

OF

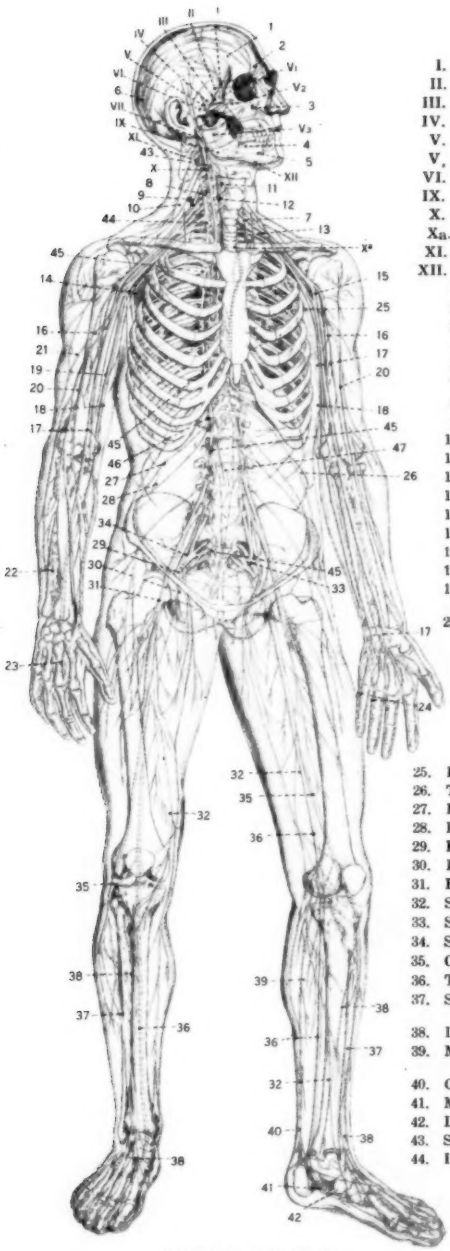
HUMAN ANATOMY

The color plates included in The Atlas of Human Anatomy are based on a series of anatomical charts by Professor Franz Frohse of the University of Berlin. Those charts were originally published in America by A. J. Nystrom & Co. of Chicago. Later, Mr. A. B. Hoen edited and regrouped the German charts and they have subsequently been supplemented by Professor Max Brödel of the Johns Hopkins Medical School, in cooperation with Mr. Leon Schlossberg of Johns Hopkins University.

The publication of these charts in the Insurance Counsel Journal was suggested by Paul F. Ahlers, Des Moines, Iowa, former chairman of the Journal Committee. Mrs. Louise B. Hinds, of the Production Department of Barnes & Noble, Inc., New York, was exceedingly helpful in making the arrangements.

It is the hope of the Executive Committee and the editors that the publication of these splendid charts will be a worthwhile service to the readers of the Insurance Counsel Journal.

ATLAS OF HUMAN ANATOMY **Plate 1**



NERVE SYSTEM

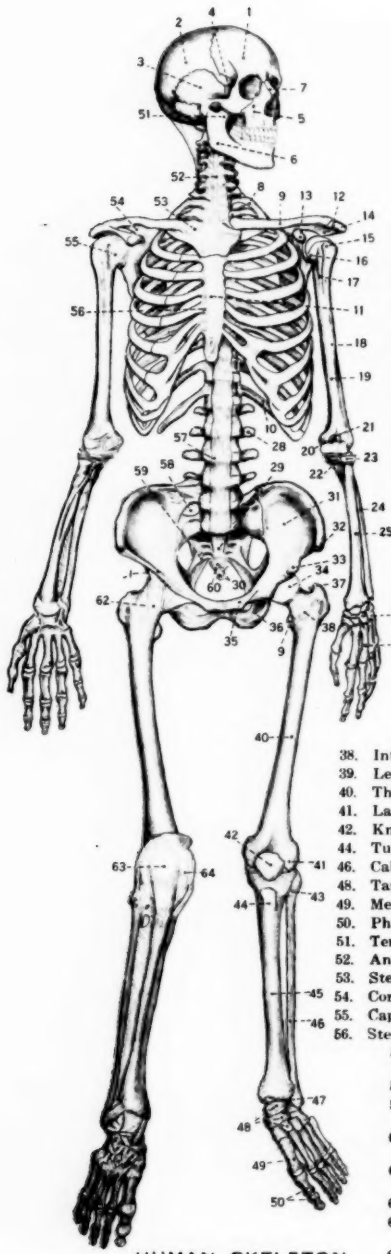
NAMES OF NERVES

I. Olfactory (*N. olfactorius*)
II. Optic (*N. opticus*)
III. Oculomotor (*N. oculomotorius*)
IV. Trochlear (*N. trochlearis*)
V. Trigeminal (*N. trigeminus*)
V_1 *Ophthalmicus*, V_2. *Maxillaris*, V_3. *Mandibularis*
VI. Abducent (*N. abducens*) VII. Facial (*N. facialis*)
IX. Glossopharyngeal (*N. glossopharyngeus*)
X. Right vagus (*N. vagus dexter*)
Xa. Left vagus (*N. vagus sinister*)
XI. Accessory (*N. accessorius*)
XII. Hypoglossal (*N. hypoglossus*)

1. Supraorbital (*N. supraorbitalis*)
2. Frontal (*N. frontalis*)
3. Infraorbital (*N. infraorbitalis*)
4. Lingual (*N. lingualis*) 5. Mental (*N. mentalis*)
6. Occipital (*N. occipitalis major*)
7. Left phrenic (*N. phrenicus sinister*)
8. Right phrenic (*N. phrenicus dexter*)
9. Supraclavicular (*Nn. supraclaviculares*)
10. Dorsal of scapula (*N. dorsalis scapulae*)
11. Superior laryngeal (*N. laryngeus superior*)
12. Loop of hypoglossal (*N. ansa hypoglossi*)
13. Brachial plexus (*N. plexus brachialis*)
14. Subscapular (*N. subscapularis*)
15. Axillary (*N. axillaris*)
16. Musculocutaneous (*N. musculocutaneus*)
17. Median (*N. medianus*) 18. Ulnar (*N. ulnaris*)
19. Middle cutaneous (*N. cutaneus antibrachii medialis*)
20. Radial (*N. radialis*)
21. Posterior cutaneous (*N. cutaneus brachii posterior*)
22. Dorsal interosseous (*N. interosseus dorsalis*)
23. Anastomatic branch of ulnar (*N. ramus anastomaticus ulnaris*)
24. Proper volar digital (*Nn. digitales volares propriі*)
25. Intercostobrachial (*N. intercostobrachialis*)
26. Twelfth intercostal (*N. intercostalis XII*)
27. Iliohypogastric (*N. iliohypogastricus*)
28. Ilioinguinal (*N. ilioinguinalis*)
29. External spermatic (*N. spermaticus externus*)
30. Lumboinguinal (*N. lumboinguinalis*)
31. Femoral (*N. femoralis*)
32. Saphenous (*N. saphenus*)
33. Sacral plexus (*plexus sacralis*)
34. Superior gluteal (*N. glutaeus superior*)
35. Common peroneal (*N. peronaeus communis*)
36. Tibial (*N. tibialis*)
37. Superficial peroneal (*N. peronaeus superficialis*)
38. Deep peroneal (*N. peronaeus profundus*)
39. Medial cutaneous (*N. cutaneus surae medialis*)
40. Calf (*N. suralis*)
41. Medial plantar (*N. plantaris medialis*)
42. Lateral plantar (*N. plantaris lateralis*)
43. Superior cervical ganglion (*Ggl. cervicale superius*)
44. Inferior cervical ganglion (*Ggl. cervicale inferius*)
45. Sympathetic trunk (*Truncus sympathicus*)
46. Coeliac ganglion (*Ggl. coeliacum*)
47. Inferior mesenteric ganglion (*Ggl. mesentericum inferius*)

Twenty-four plates from *Atlas of Human Anatomy*, published by Barnes & Noble, Inc., New York, N. Y. Reprinted by permission.

Plate 2 ATLAS OF HUMAN ANATOMY



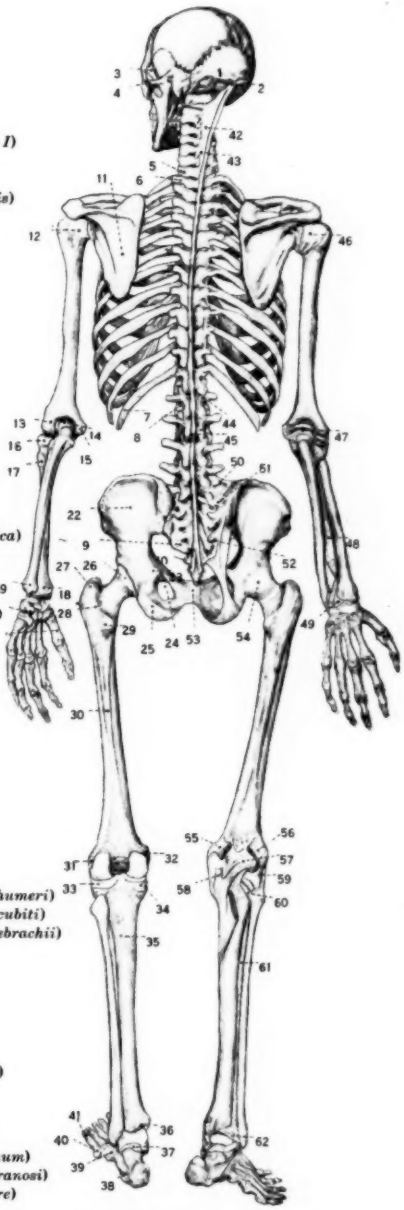
HUMAN SKELETON
FRONT VIEW

BONES, JOINTS AND LIGAMENTS

1. Frontal (*Os frontale*)
2. Parietal (*Os parietale*)
3. Temporal (*Os temporale*)
4. Sphenoid (*Os sphenoidale*)
5. Maxilla (*Maxilla*) 6. Mandible (*Mandibula*)
7. Nasal. (*Os nasale*)
8. First rib (*Costa I*)
9. Clavicle (*Clavicula*)
10. Twelfth rib (*Costa XII*)
11. Body of sternum (*Corpus sterni*)
12. Acromion (*Acromion*)
13. Coracoid process (*Processus Coracoideus*)
14. Glenoid cavity (*Cavitas glenoidalis*)
15. Greater tubercle (*Tuberculum majus*)
16. Lesser tubercle (*Tuberculum minus*)
17. Bicipital groove (*Sulcus intertubercularis*)
18. Deltoid tuberosity (*Tuberositas deltoidea*)
19. Humerus (*Humerus*)
20. Coronoid fossa (*Fossa coronoidea*)
21. Radial fossa (*Fossa radialis*)
22. Coronoid process (*Processus coronoideus*)
23. Head of radius (*Capitulum radii*)
24. Ulna (*Ulna*) 25. Radius
26. Carpal bones (*Ossa carpalia*)
27. Metacarpal bones (*Ossa metacarpalia*)
28. Transv. process (*Processus transversus*)
29. Sacrum (*Os sacrum*) 30. Coccyx (*Os coccygis*)
31. Ilium (*Os ilium*)
32. Anterior superior iliac spine (*Spina iliaca anterior superior*)
33. Anterior inferior iliac spine (*Spina iliaca anterior inferior*)
34. Head of Femur (*Caput femoris*)
35. Pubic (*Os pubis*)
36. Superior branch of ischium (*Ramus superior ossis ischii*)
37. Great trochanter (*Trochanter major*)
38. Intertrochanteric line (*Linea intertrochanterica*)
39. Lesser trochanter (*Trochanter minor*)
40. Thigh bone (*Femur*)
41. Lateral condyle (*Condylus femoris lateralis*)
42. Knee cap (*Patella*) 43. Head of fibula (*Capitulum fibulae*)
44. Tuberosity (*Tuberositas tibiae*) 45. Shin bone (*Tibia*)
46. Calf bone (*Fibula*) 47. Ankle bone (*Malleolus lateralis*)
48. Tarsal bones (*Ossa tarsi*)
49. Metatarsal bones (*Ossa metatarsalia*)
50. Phalanges (*Phalanges*)
51. Temporo-mandibular ligament (*L. temporomandibulare*)
52. Anterior longitudinal lig. (*L. longitudinale anterius*)
53. Sternoclavicular joint (*Articulatio sternoclavicularis*)
54. Coracoclavicular ligament (*L. coracoclaviculare*)
55. Capsule of shoulder joint (*Capsula articularis humeri*)
56. Sterno-costal joint (*Articulatio sternocostalis*)
57. Intervertebral fibrocartilage (*Fibrocartilago intervertebralis*)
58. Sacro-iliac joint (*Articulatio sacroiliaca*)
59. Ligaments of sacrum and ischium (*L. Sacrospinosum et L. sacrotuberosum*)
60. Anterior sacro-coccygeal ligament (*L. sacrococcygeum anterius*)
61. Inguinal (Poupart's) ligament. (*L. inguinale*)
62. Ileofemoral ligament (*L. iliofemorale*)
63. Tendon of quadriceps muscle (*Tendo musculi quadricipitis*)
64. Capsule of knee-joint (*Capsula articulationis genu*)

ATLAS OF HUMAN ANATOMY **Plate 3**

1. Occipital (*Os occipitale*)
2. External occipital protuberance (*Protuberantia occipitalis externa*)
3. Sphenoid (*Os sphenoidale*)
4. Arch of zygoma (*Arcus zygomaticus*)
5. Seventh cervical vertebra (*Vertebra prominens cervicalis VII*)
6. First thoracic vertebra (*Vertebra thoracalis I*)
7. Twelfth rib (*Costa XII*)
8. First lumbar vertebra (*Vertebra lumbalis I*)
9. Sacrum (*Os sacrum*). 10. Coccyx (*Os coccygis*)
11. Shoulder blade (*Scapula*)
12. Head of humerus (*Caput humeri*)
13. Lateral epicondyle (*Epicondylus lateralis*)
14. Point of elbow (*Olecranon*)
15. Medial epicondyle (*Epicondylus medialis*)
16. Head of radius (*Capitulum radii*)
17. Tuberosity of radius (*Tuberositas radii*)
18. Base of radius (*Basis radii*)
19. Head of ulna (*Capitulum ulnae*)
20. Bones of the wrist (*Ossa carpalia*)
21. Bones of the hand (*Ossa metacarpalia*)
22. Hip bone (*Os coxae*)
23. Spine of ischium (*Spina ischiadica*)
24. Obturator foramen (*Foramen obturatorium*)
25. Tuberosity of ischium (*Tuber ischiadicum*)
26. Head of femur (*Caput femoris*)
27. Great trochanter (*Trochanter major*)
28. Intertrochanteric line (*Linea intertrochanterica*)
29. Lesser trochanter (*Trochanter minor*)
30. Rough line (*Linea aspera*)
31. Lateral condyle of femur (*Condylus lateralis femoris*)
32. Medial condyle of femur (*Condylus medialis femoris*)
33. Lateral condyle (*Condylus lateralis tibiae*)
34. Medial condyle (*Condylus medialis tibiae*)
35. Popliteal line (*Linea poplitea*)
36. Medial ankle bone (*Malleolus medialis*)
37. Ankle (*Talus*) 38. Heel (*Os calcaneum*)
39. Cuboid (*Os cuboideum*)
40. Metatarsal bones (*Ossa metatarsalia*)
41. Phalanges of the toes (*Phalanges*)
42. Ligament of the nape (*L. nuchae*)
43. Vertebral joint capsule (*Capsula articularis vertebrarum*)
44. Yellow ligament (*L. flavum*)
45. Supraspinous ligament (*L. supraspinale*)
46. Capsule of shoulder joint (*Capsula articularis humeri*)
47. Capsule of elbow joint (*Capsula articularis cubiti*)
48. Interosseous memb. (*Membrana interossea antebrachii*)
49. Wrist joint (*Articulatio radiocarpalis*)
50. Ilio-lumbar ligament (*L. iliolumbale*)
51. Interosseous sacro-iliac ligament (*L. sacroiliacum interosseum*)
52. Long posterior sacro-iliac ligament (*L. sacroiliacum posterius longum*)
53. Pubic symphysis (*Symphysis ossis pubis*)
54. Capsule of hip joint (*Capsula articularis coxae*)
55. Medial head of gastrocnemius (*Caput mediale M. gastrocnemii*)
56. Lateral head of gastrocnemius (*Caput laterale M. gastrocnemii*)
57. Oblique popliteal ligament (*L. popliteum obliquum*)
58. Tendon of semimembranosus (*T. M. semimembranosi*)
59. Collateral fibular ligament (*L. collaterale fibulare*)
60. Tibio-fibular artic. (*Articulatio tibiofibularis*)
61. Interosseous membr. (*Membrana interossea cruris*)
62. Posterior ligament of lateral ankle (*L. posterius malleoli lateralis*)



HUMAN SKELETON
BACK VIEW

Plate 4 ATLAS OF HUMAN ANATOMY

MUSCLES—FRONT VIEW

MUSCLES, TENDONS AND LIGAMENTS

1. Frontal (*M. frontalis*)
2. Orbicular of eye (*M. orbicularis oculi*)
3. Cheek (*M. buccinator*) 4. Masseter (*M. masseter*)
5. Quadrate muscle of lower lip (*M. quadratus labii inferioris*)
6. Orbicular of mouth (*M. orbicularis oris*)
7. Flat (*M. platysma*)
8. Thyreohyoid (*M. thyreohyoideus*)
9. Omohyoid (*M. Omohyoideus*)
10. Sternohyoid (*M. sternohyoideus*)
11. Sternocleido-mastoid (*M. sternocleido-mastoideus*)
12. Trapezius (*M. trapezius*)
13. Greater pectoral (*M. pectoralis major*)
14. Smaller pectoral (*M. pectoralis minor*)
15. Serratus magnus (*M. serratus anterior*)
16. External oblique (*M. obliquus externus abdominis* [*abdominis*)
17. Sheath of rectus (*Vagina m. recti*
18. Inguinal (Poupart's) lig. (*L. inguinale*)
19. Broadest muscle of back (*M. latissimus dorsi*)
20. Larger round (*M. teres major*)
21. Subscapular (*M. subscapularis*)
22. Deltoid (*M. deltoideus*)
23. Coraco-brachial (*M. coracobrachialis*)
24. Biceps (*M. biceps*)
25. Round pronator (*M. pronator teres*)
26. Radial flexor (*M. flexor carpi radialis*)
27. Long palmar (*M. palmaris longus*)
28. Ulnar flexor (*M. flexor carpi ulnaris*)
29. Superficial flexor of fingers (*M. flexor digitorum sublimis*)
30. Brachio-radial (*M. brachioradialis*)
31. Quadrate pronator (*M. pronator quadratus*)
32. Long abductor of thumb (*M. abductor pollicis longus*)
33. Deep flexor of fingers (*M. flexor digitorum profundus*)
34. Anterior superior iliac spine (*Spina iliaca anterior superior*)
35. Tensor of broad fascia (*M. tensor fasciae latae*)
36. Tailor (*M. sartorius*) 37. Iliac (*M. iliacus*)
38. Greater psoas (*M. psoas major*)
39. Four-headed thigh (*M. quadriceps femoris*)

39a. Straight head (*M. rectus femoris*)

39b. Middle great (*M. vastus medialis*)

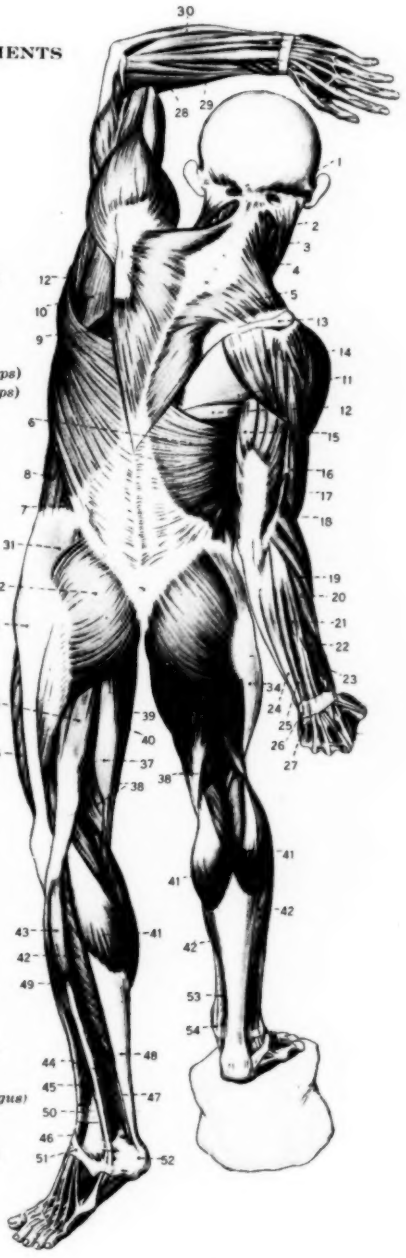
39c. Lateral great (*M. vastus lateralis*)

40. Tendon of quadriceps (*Tendo M. quadricipitis femoris*)
41. Pectineus (*M. pectineus*)
42. Long adductor (*M. adductor longus*)
43. Slender (*M. gracilis*)
44. Great adductor (*M. adductor magnus*)
45. Gastrocnemius (*M. gastrocnemius*)
46. Achilles' tendon (*Tendo calcaneus*)
47. Long flexor of toes (*M. flexor digitorum longus*)
48. Posterior tibial (*M. tibialis posterior*)
49. Long flexor of toe (*M. flexor hallucis longus*)
50. Anterior tibial (*M. tibialis anterior*)
51. Long extensor of great toe (*M. extensor hallucis longus*)
52. Long extensor of toes (*M. extensor digitorum longus*)
53. Long peroneal ((*M. peronaeus longus*)

Atlas of Human Anatomy Plate 5

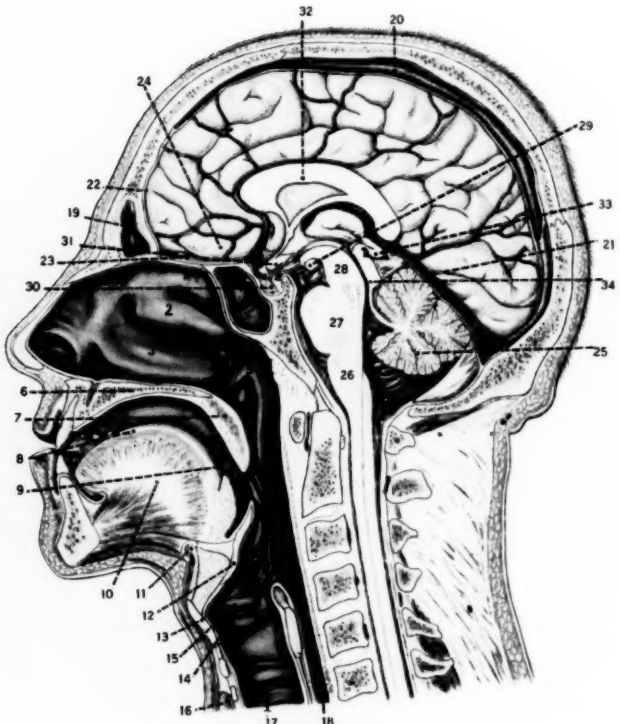
MUSCLES, TENDONS AND LIGAMENTS

1. Occipital (*M. occipitalis*)
2. Semispinal (*M. semispinalis capitis*)
3. Splenius (*M. splenius capitis*)
4. Sternocleido-mastoid (*M. sternocleido-mastoideus*)
5. Trapezius (*M. trapezius*)
6. Broadest of back (*M. latissimus dorsi*)
7. Internal oblique (*M. obliquus internus abdominis*)
8. External oblique (*M. obliquus externus abdominis*)
9. Larger rhomboides (*M. rhomboideus major*)
10. Infraspinous (*M. infraspinalis*)
11. Smaller round (*M. teres minor*)
12. Larger round (*M. teres major*)
13. Spine of scapula (*Spina scapulae*)
14. Deltoid (*M. deltoideus*) 15. Triceps (*M. triceps*)
16. Brachial (*M. brachialis*) 17. Biceps (*M. biceps*)
18. Brachioradial (*M. brachioradialis*)
19. Long radial extensor of wrist (*M. extensor carpi radialis longus*)
20. Short radial extensor of wrist (*M. extensor carpi radialis brevis*)
21. Common extensor of fingers (*M. extensor digitorum communis*)
22. Long adductor of thumb (*M. adductor pollicis longus*)
23. Short extensor of thumb (*M. extensor pollicis brevis*)
24. Ulnar extensor of wrist (*M. extensor carpi ulnaris*)
25. Extensor of fifth finger (*M. extensor digiti quinti proprius*)
26. Dorsal ligament of wrist (*L. carpi dorsale*)
27. Abductor of fifth finger (*M. abductor digiti quinti*)
28. Round pronator (*M. pronator teres*)
29. Radial flexor (*M. flexor carpi radialis*)
30. Ulnar flexor (*M. flexor carpi ulnaris*)
31. Middle gluteal (*M. glutaeus medius*)
32. Greatest gluteal (*M. glutaeus maximus*)
33. Tensor of broad fasciae (*M. tensor fasciae latae*)
34. Great trochanter (*Trochanter major*)
35. Lateral great (*M. vastus lateralis*)
36. Biceps (*M. biceps femoris*)
37. Semitendinous (*M. semitendinosus*)
38. Semimembranous (*M. semimembranosus*)
39. Slender (*M. gracilis*)
40. Great adductor (*M. adductor magnus*)
41. Gastrocnemius (*M. gastrocnemius*)
42. Soleus (*M. soleus*)
43. Long peroneal (*M. peronaeus longus*)
44. Short peroneal (*M. peronaeus brevis*)
45. Long entensor of toes (*M. extensor digitorum longus*)
46. Third peroneal (*M. peronaeus tertius*)
47. Long flexor of great toe (*M. flexor hallucis longus*)
48. Achilles' tendon (*Tendo calcaneus*)
49. Anterior tibial (*M. tibialis anterior*)
50. Transverse ligament (*L. transversum cruris*)
51. Cruciate ligament (*L. cruciatum cruris*)
52. Heel bone (*Os calcaneus*)
53. Long flexor of toes (*M. flexor digitorum longus*)
54. Tendon of posterior tibial (*Tendo M. tibialis posterioris*)



MUSCLES - Back View

Plate 6 ATLAS OF HUMAN ANATOMY

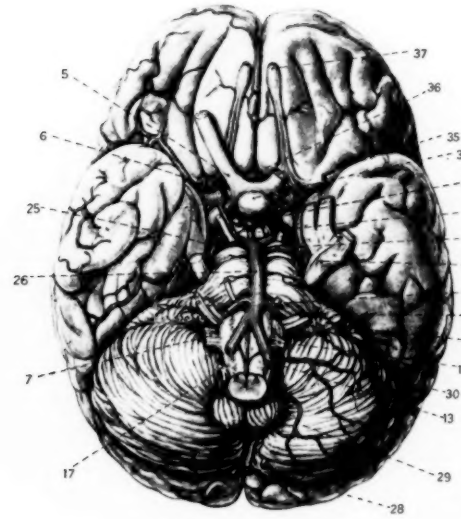


THE HEAD
MEDIAN SECTION

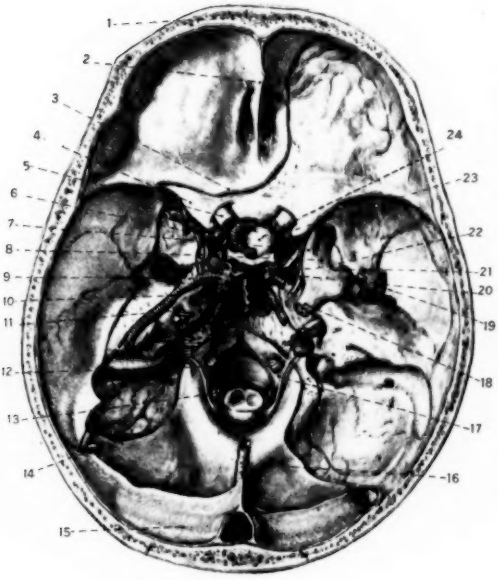
NAMES OF PARTS

1. Superior turbinated bone (*Concha nasalis superior*)
2. Middle turbinated bone (*Concha nasalis media*)
3. Inferior turbinated bone (*Concha nasalis inferior*)
4. Sphenoidal sinus (*Sinus sphenoidalis*)
5. Tubal protuberance (*Torus tubarius*)
6. Hard palate (*Palatum durum*)
7. Soft palate (*Palatum molle*)
8. Back of tongue (*Dorsum linguae*)
9. Tonsil (*Tonsilla palatina*)
10. Genioglossal muscle (*M. genioglossus*)
11. Hyoid bone (*Os hyoideum*)
12. Epiglottis (*Epiglottis*)
13. Thyroid cartilage (*Cartilago thyreoidea*)
14. Vocal fold (*Plica vocalis*)
15. Ventricular fold (*Plica ventricularis*)
16. Thyroid gland (*Glandula thyreoidea*)
17. Windpipe (*Trachea*)
18. Gullet (*Oesophagus*)
19. Frontal sinus (*Sinus frontalis*)
20. Superior sagittal sinus (*Sinus sagittalis superior*)
21. Straight sinus (*Sinus rectus*)
22. Dura mater (*Dura mater*)
23. Olfactory bulb (*Bulbus olfactorius*)
24. Frontal lobe (*Lobus frontalis superior*)
25. Worm of cerebellum (*Vermis cerebelli*)
26. Oblong medulla (*Medulla oblongata*)
27. Pons (*Pons*)
28. Leg of cerebrum (*Crus cerebri*)
29. Mamillary body (*Corpus mamillare*)
30. Pituitary body (*Hypophysis*)
31. Optic chiasma (*Chiasma nervi optici*)
32. Great commissure (*Corpus callosum*)
33. Pineal body (*Corpus pineale*)
34. Quadrigeminal bodies (*Corpora quadrigemina*)

ATLAS OF HUMAN ANATOMY **Plate 7**



BASE OF BRAIN



BASE OF SKULL

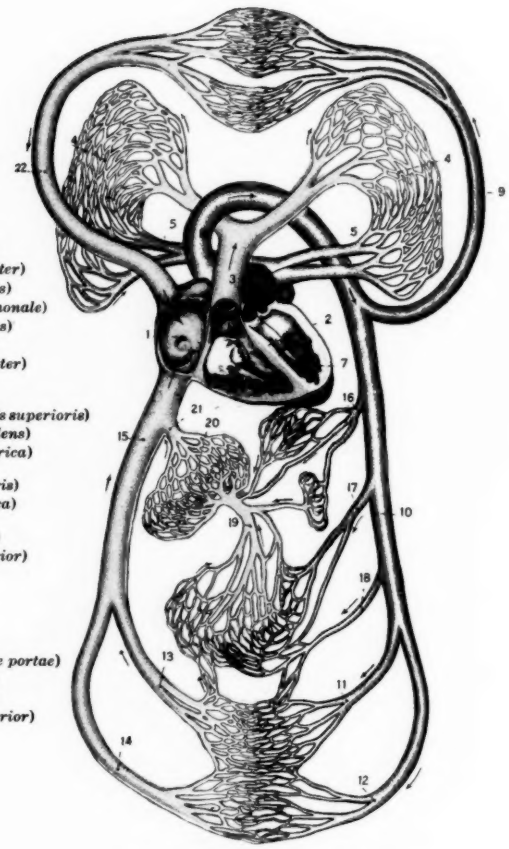
NAMES OF PARTS

1. Frontal bone (*Os frontale*)
2. Ethmoid crest (*Crista galli*)
3. Dura mater (*Dura mater*)
4. Sphenoid bone (*Os sphenoidale*)
5. Optic nerve (*N. opticus*)
6. Internal carotid (*A. carotis interna*)
7. Trigeminal nerve, ophthalmic part (*N. trigeminus, pars ophthalmica*)
8. Trigeminal, maxillary part (*N. maxillaris*)
9. Cavernous venous plexus (*Plexus cavernosum venarum*)
10. Superior petrosal sinus (*Sinus petrosus superior*)
11. Auditory, facial, and intermediate nerves and auditory artery (*Nn. acoustici faciales, et intermediales et A. auditiva*)
12. Hypoglossal nerve (*N. hypoglossus*)
13. Vertebral artery (*A. vertebralis*)
14. Inferior cerebral vein (*V. cerebri inferior*)
15. Lateral sinus (*Sinus transversus*)
16. Straight sinus (*Sinus rectus*)
17. Spinal accessory nerve (*N. accessorius*)
18. Trigeminal nerve (*N. trigeminus*)
19. Middle meningeal artery and veins (*A. et Vv. meningeales mediales*)
20. Abducent nerve (*N. abducens*)
21. Trigeminal, mandibular part (*N. mandibularis*)
22. Oculomotor nerve (*N. oculomotorius*)
23. Ophthalmic artery (*A. ophthalmica*)
24. Site for hypophysis (*Sella turcica*)
25. Posterior cerebral artery (*A. cerebri posterior*)
26. Basilar artery (*A. basilaris*)
27. Glossopharyngeal and vagus nerves (*Nn. glossopharyngeus et vagus*)
28. Inferior superficial cerebellar veins (*Vv. cerebelli inferiores superficiales*)
29. Posterior inferior cerebellar artery (*A. cerebelli inferior posterior*)
30. Anterior inferior cerebellar artery (*A. cerebelli inferior anterior*)
31. Lateral superior cerebellar vein (*V. cerebelli superior lateralis*)
32. Trochlear nerve (*N. trochlearis*)
33. Posterior communicating artery (*A. communicans posterior*)
34. Hypophysis (*Hypophysis*)
35. Sylvian vein (*V. cerebri media*)
36. Anterior communicating artery (*A. communicans anterior*)
37. Olfactory bulb and nerves (*Bulbus olfactorius et nervi*)

Plate 8 ATLAS OF HUMAN ANATOMY

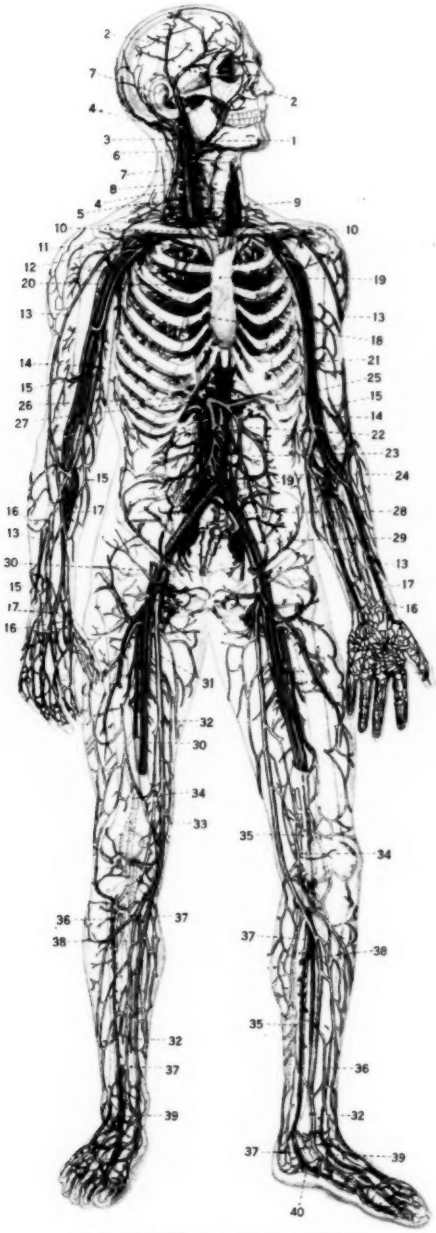
NAMES OF PARTS

1. Right auricle (*Atrium dextrum*)
2. Right ventricle (*Ventriculus dexter*)
3. Pulmonary artery (*A. pulmonalis*)
4. Pulmonary capillaries (*Rete pulmonale*)
5. Pulmonary veins (*Vv. pulmonales*)
6. Left auricle (*Atrium sinistrum*)
7. Left ventricle (*Ventriculus sinister*)
8. Aortic arch (*Arcus aortae*)
9. Arteries of head and upper limb (*Arteriae capitis et extremitatis superioris*)
10. Descending aorta (*Aorta descendens*)
11. Hypogastric artery (*A. hypogastrica*)
12. Arteries of lower limb (*Arteriae extremitatis inferioris*)
13. Hypogastric vein (*V. hypogastrica*)
14. Veins of lower limbs (*Venae extremitatis inferioris*)
15. Inferior vena cava (*V. cava inferior*)
16. Celiac artery (*A. coeliaca*)
17. Superior mesenteric artery (*A. mesenterica superior*)
18. Inferior mesenteric artery (*A. mesenterica inferior*)
19. Portal circulation (*Systema venae portae*)
20. Capillaries of liver (*Rete hepatis*)
21. Hepatic veins (*Venae hepaticae*)
22. Superior vena cava (*V. cava superior*)



SCHEMA OF CIRCULATION

ATLAS OF HUMAN ANATOMY **Plate 9**



THE CIRCULATION SYSTEM
BLOOD VESSELS

NAMES OF PARTS

1. External maxillary (*A. maxillaris externa*)
2. Middle meningeal (*A. meningea media*)
3. External jugular (*V. jugularis externa*)
4. Vertebral (*A. vertebralis*)
5. Common carotid (*A. carotis communis*)
6. External carotid (*A. carotis externa*)
7. Internal carotid (*A. carotis interna*)
8. Internal jugular (*V. jugularis interna*)
9. Bulb of jugular (*Bulbus V. jugularis*)
10. Subclavian (*A. subclavia*)
11. Subclavian (*V. subclavia*)
12. Axillary (*A. et. V. azillaris*)
13. Cephalic (*V. cephalica*)
14. Brachial (*A. brachialis*)
15. Basilic (*V. basilica*)
16. Radial (*A. radialis*)
17. Ulnar (*A. ulnaris*)
18. Heart (*Cor*)
19. Aorta (*Aorta*)
20. Superior vena cava (*V. cava superior*)
21. Intercostal (*A. intercostalis*)
22. Superior mesenteric (*A et V. mesenterica superior*)
23. Inferior mesenteric (*A. mesenterica inferior*)
24. Sigmoid (*A. et V. sigmoidales*)
25. Inferior mesenteric (*V. mesenterica inferior*)
26. Portal (*V. portae*)
27. Right renal (*A. et V. renalis dextra*)
28. Common iliac (*A. et V. iliaca communis*)
29. External iliac (*A. et V. iliaca externa*)
30. Femoral (*A. et V. femoralis*)
31. Deep femoral (*A. et V. profunda femoris*)
32. Large saphenous (*V. saphena magna*)
33. Lateral superior artery of knee (*A. genus superior lateralis*)
34. Popliteal (*A. et V. poplitea*)
35. Small saphenous (*V. saphena parva*)
36. Anterior tibial (*A. et V. tibialis anterior*)
37. Posterior tibial (*A. tibialis posterior*)
38. Peroneal (*A. peronaea*)
39. Dorsal (*A. et V. dorsalis pedis*)
40. Medial plantar (*A. plantaris medialis*)

Plate 10 ATLAS OF HUMAN ANATOMY

NAMES OF PARTS—Figs. 1, 2, 3 and 4

1. Innominate (*A. anonyma*)
2. Left common carotid (*A. carotis sinistra*)
3. Left subclavian (*A. subclavia sinistra*)
4. Ascending aorta (*Aorta ascendens*)
5. Arch of aorta (*Arcus aortae*)
6. Arterial ligament (*L. arteriosum*)
7. Pulmonary (*A. pulmonalis*)
8. Right pulmonary (*Aa. pulmonales dextrae*)
9. Left pulmonary (*A. pulmonalis sinistra*)
10. Superior vena cava (*V. cava superior*)
11. Inferior vena cava (*V. cava inferior*)
12. Oval fossa (*Fossa ovalis*)
13. Eustachian valve (*Valvula V. cavae*)
14. Valve of coronary sinus (*Valvula sinus coronarii*)
15. Right coronary (*A. coronaria dextra*)
16. Left coronary (*A. coronaria sinistra*)
17. Great cardiac vein (*V. cordis magna*)
18. Right ventricle (*Ventriculus dexter*)
19. Interventricular septum (*Septum ventriculorum*)
20. Papillary muscles (*Mm. papillares*)
21. Tricuspid valve (*Valvulae tricuspidalis—Cuspis anterior*)
22. Arterial cone (*Conus arteriosus*)
23. Right anterior pulmonary semilunar valve (*Valvula dextra lunares arteriae pulmonalis*)
24. Left anterior (*Valvula sinistra*)
25. Posterior (*Valvula posterior*)
26. Left auricle (*Auricula sinistra*)
27. Left atrium (*Atrium sinistrum*)
28. Right pulmonary (*Vv. pulmonales dextrae*)
29. Left pulmonary (*Vv. pulmonales sinistrae*)
30. Coronary sinus (*Sinus coronarius*)
31. Bicuspid valve. anterior cusp (*Cuspis anterior valvulae bicuspidalis*)

31a. (*Cuspis posterior*)

32. Left ventricle (*Ventriculus sinister*)

33, 33a, 33b. Aortic semilunar valves (*Valvulae semilunares aortae*)

34. Apex of Heart (*Apex cordis*)

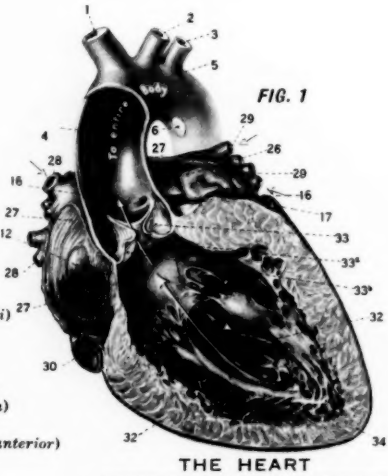


FIG. 1

THE HEART
POSTERIOR CORONAL SECTION
SHOWING L. AURICLE AND L. VENTRICLE

FIG. 2

AORTIC VALVE

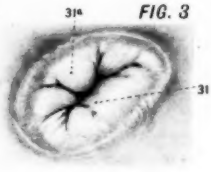


FIG. 3

MITRAL VALVE
OR
BICUSPID VALVE

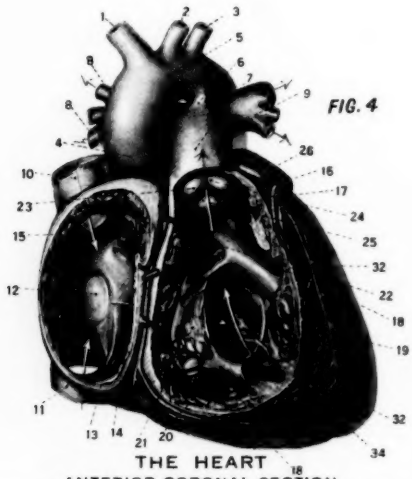
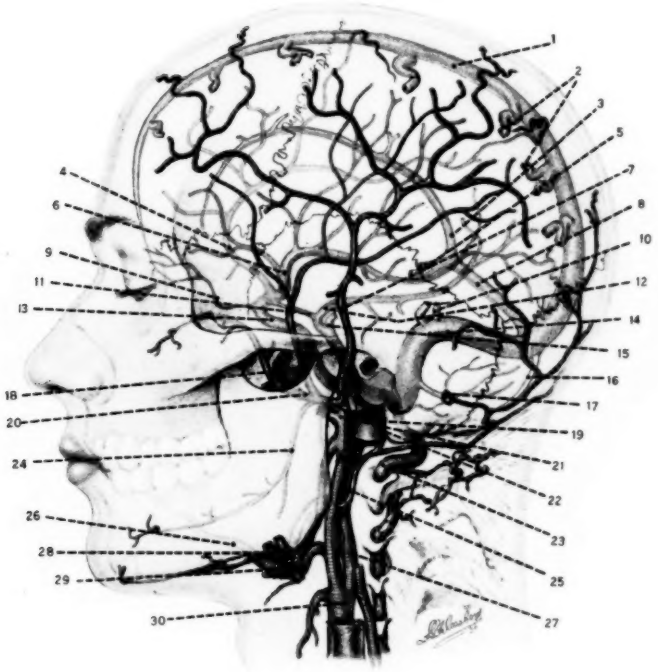


FIG. 4

THE HEART
ANTERIOR CORONAL SECTION
SHOWING INTERIOR OF R. AURICLE AND R. VENTRICLE

ATLAS OF HUMAN ANATOMY **Plate 11**



CIRCULATION SYSTEM OF THE HEAD

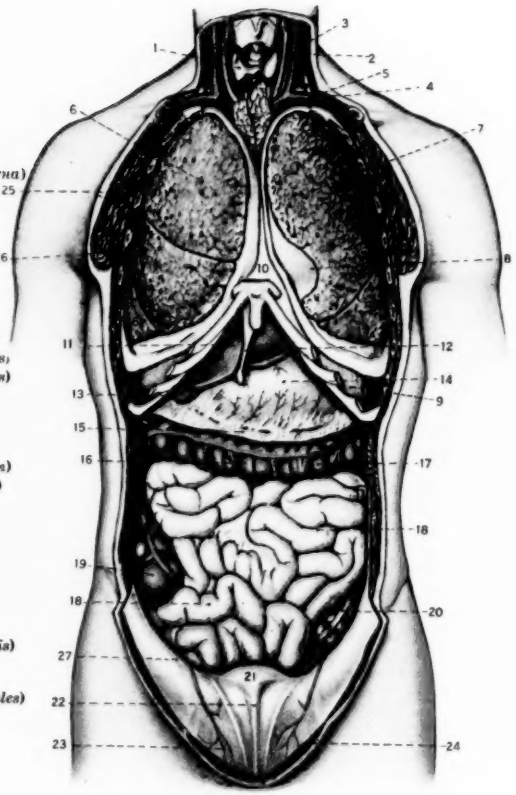
NAMES OF PARTS

1. Superior sagittal sinus (*Sinus sagittalis superior*)
2. Superior cerebral veins (*Vv. cerebri superiores*)
3. Inferior sagittal sinus (*Sinus sagittalis inferior*)
4. Anterior cerebral artery (*A. cerebri anterior*)
5. Vein of Galen. (*V. Galeni, v. cerebri magna*)
6. Middle cerebral artery (*A. cerebri media*)
7. Superficial temporary artery (*A. temporalis superficialis*)
8. Straight sinus (*Sinus rectus*)
9. Ophthalmic artery (*A. ophthalmica*)
10. Cerebral veins (*Vv. cerebri*)
11. Posterior communicating artery (*A. communicans posterior*)
12. Posterior cerebral arteries (*Aa. cerebri posteriores*)
13. Internal carotid artery (*A. carotis interna*)
14. Lateral sinus (*Sinus transversus*)
15. Basilar artery (*A. basilaris*)
16. Occipital sinus (*Sinus occipitalis*)
17. Mastoid foramen, artery and vein (*Foramen mastoideum, A. et. V.*)
18. Middle meningeal artery (*A. meningea media*)
19. Internal jugular vein (*V. jugularis interna*)
20. Internal maxillary artery (*A. maxillaris interna*)
21. External jugular vein and external carotid artery (*V. jugularis externa et. A. carotis externa*)
22. Posterior meningeal artery (*A. meningea posterior*)
23. Vertebral artery and venous plexus (*A. vertebralis et vv. plexus*)
24. Inferior alveolar artery (*A. alveolaris inferior*)
25. Occipital artery (*A. occipitalis*)
26. Lingual artery (*A. lingualis*)
27. Internal carotid artery (*A. carotis interna*)
28. External maxillary artery (*A. maxillaris externa*)
29. Common facial vein (*V. facialis communis*)
30. Common carotid artery (*A. carotis communis*)

Plate 12 ATLAS OF HUMAN ANATOMY

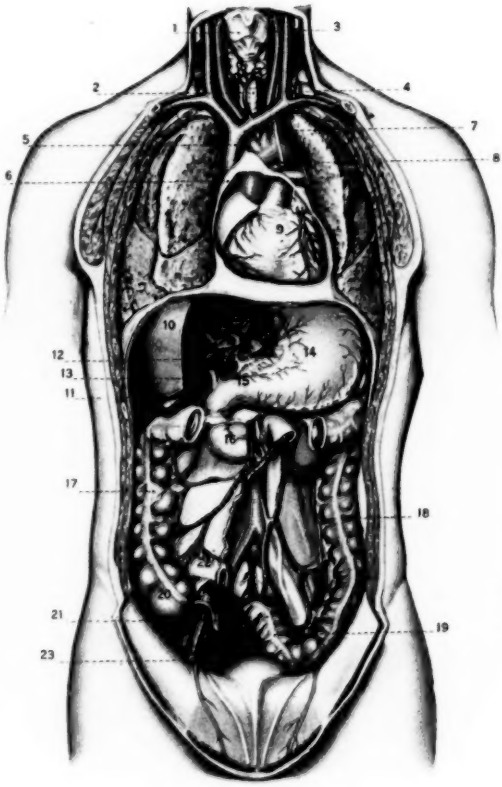
NAMES OF PARTS

1. Thyroid gland (*Gl. thyreoidea*)
2. Internal jugular (*V. jugularis interna*)
3. Sternocleido-mastoid (*M. sternocleido-mastoideus*)
4. Subclavian (*A. et V. subclavia*)
5. Thymus (*Thymus*)
6. Right lung (*Pulmo dexter*)
7. Left lung (*Pulmo sinister*)
8. Cardiac notch (*Incisura cardiaca*)
9. Diaphragm (*Diaphragma*)
10. Pericardium (*Pericardium*)
11. Right lobe liver (*Lobus dexter hepatis*)
12. Left lobe liver (*Lobus sinister hepatis*)
13. Gall bladder (*Vesica fellea*)
14. Stomach (*Ventriculus*)
15. Greater omentum (cut edge) (*Omentum majus*)
16. Transverse colon (*Colon transversum*)
17. Sacculation of colon (*Haustrum coli*)
18. Small intestine (*Intestinum tenue*)
19. Blind intestine (*Caecum*)
20. Sigmoid (*Colon sigmoideum*)
21. Bladder (*Vesica urinaria*)
22. Medial umbilical fold (*Plica umbilicalis media*)
23. Inferior epigastric (*A. epigastrica inferior*)
24. Straight muscle (*M. rectus abdominis*)
25. Greater pectoral muscle (*M. pectoralis major*)
26. Intercostal muscles (*Mm. intercostales*)
27. Peritoneum (*Peritonaeum*)



VISCERA OF CHEST AND ABDOMEN
FIRST LAYER

ATLAS OF HUMAN ANATOMY **Plate 13**



VISCERA OF CHEST AND ABDOMEN
SECOND LAYER

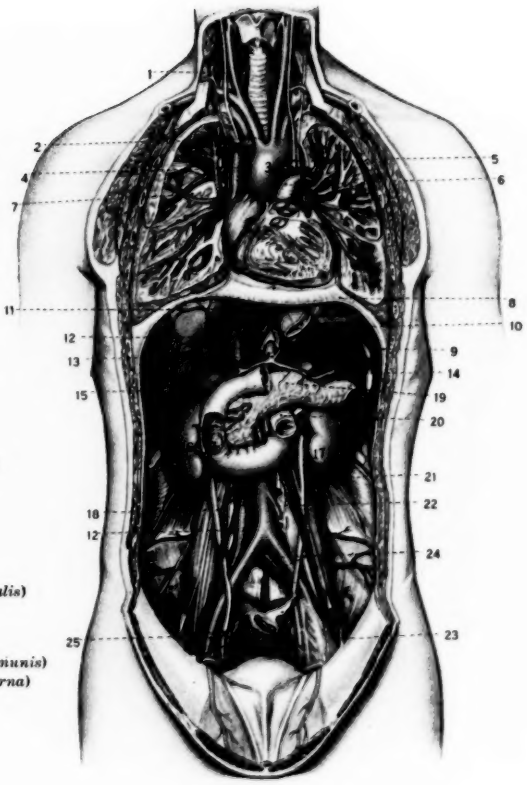
NAMES OF PARTS

1. Thyroid cartilage (*Cartilago thyreoidea*)
2. Windpipe (*Trachea*)
3. Left common carotid (*A. carotis communis sinistra*)
4. Thoracic duct (*Ductus thoracicus*)
5. Superior cava (*V. cava superior*)
6. Pericardium (*Pericardium*)
7. Phrenic (*N. phrenicus*)
8. Vagus (*N. vagus*)
9. Heart (*Cor*)
10. Liver (*Hepar*)
11. Gall bladder (*Vessica fellea*)
12. Hepatic artery, portal vein, hepatic duct (*A. hepatica propria, V. portae, ductus hepaticus*)
13. Foramen of Winslow (*Foramen epiploicum*)
14. Stomach (*Ventriculus*)
15. Pylorus (*Pylorus*)
16. Duodenum (*Duodenum*)
17. Ascending colon (*Colon ascendens*)
18. Descending colon *Colon descendens*)
19. Sigmoid (*Colon sigmoideum*)
20. Blind intestine (*Caecum*)
21. Appendix (*Processus vermiformis*)
22. Ileum (*Ileum*)
23. Spermatic duct (*Ductus deferens*)

Plate 14 ATLAS OF HUMAN ANATOMY

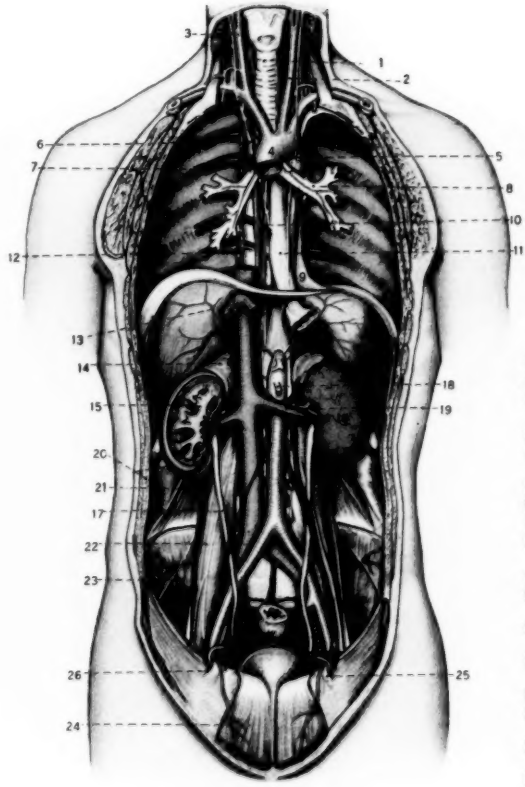
NAMES OF PARTS

1. Vertebral (*A. vertebralis*)
2. Innominate (*A. anonyma*)
3. Aortic arch (*Arcus aortae*)
4. Superior cava (*V. cava superior*)
5. Left vagus (*N. vagus sinister*)
6. Pulmonary (*A. pulmonalis*)
7. Pulmonary vessels and bronchii (*Vasa pulmonalia et bronchii*)
8. Pleura (*Pleura*)
9. Diaphram (*Diaphragma*)
10. Cardiac end of stomach (*Cardia*)
11. Hepatic veins (*Vv. hepaticae*)
12. Inferior cava (*V. cava inferior*)
13. Coeliac (*A. coeliaca*)
14. Spleen and splenic vessels (*Lien et vasa lienalia*)
15. Right suprarenal gland (*Glandula suprarenalis dextra*)
16. Right kidney (*Ren dexter*)
17. Left kidney (*Ren sinister*)
18. Ureter (*Ureter*)
19. Pancreas (*Pancreas*)
20. Duodenojejunal flexure (*Flexura duodenojejunalis*)
21. Abdominal aorta (*Aorta abdominalis*)
22. Inferior mesenteric (*A. mesenterica inferior*)
23. Femoral nerve (*N. femoralis*)
24. Common iliac (*A. et V. iliaca communis*)
25. External iliac (*A. et V. iliaca externa*)
26. Rectum (*Rectum*)



VISCERA OF CHEST AND ABDOMEN
THIRD LAYER

ATLAS OF HUMAN ANATOMY **Plate 15**



VISCERA OF CHEST AND ABDOMEN
FOURTH LAYER

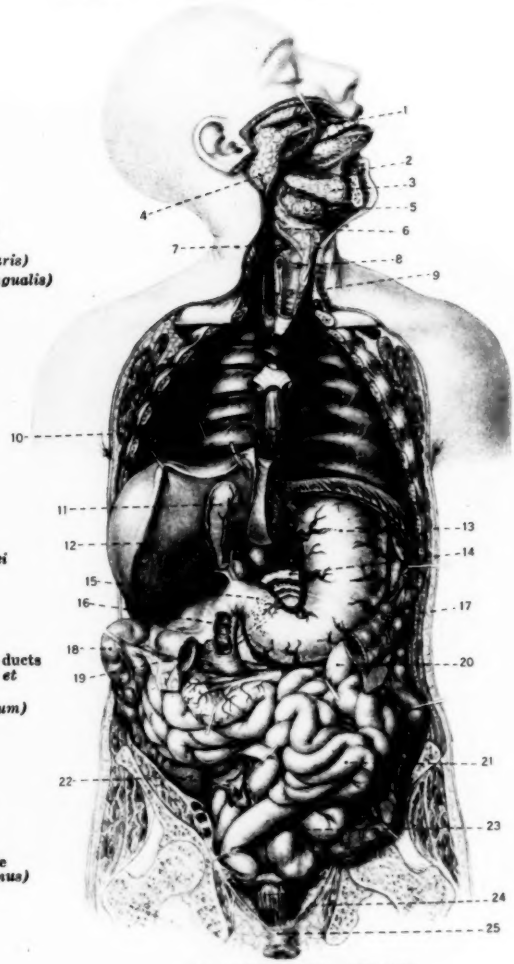
NAMES OF PARTS

1. Windpipe (*Trachea*)
2. Left common carotid (*A. carotis communis sinistra*)
3. Right common carotid (*A. carotis communis dextra*)
4. Aortic arch (*Arcus aortae*)
5. Left vagus (*N. vagus sinister*)
6. Right vagus ((*N. vagus dexter*)
7. Intercostal nerves and vessels (*Nn. et Vasa intercostales*)
8. Left bronchus and bronchial artery (*Bronchus sinister et A. bronchialis*)
9. Costal pleura (*Pleura costalis*)
10. Thoracic duct (*Ductus thoracicus*)
11. Gullet (*Oesophagus*)
12. Sympathetic trunk (*Truncus sympatheticus*)
13. Hepatic veins (*Vv. hepaticae*)
14. Suprarenal gland (*Glandula suprarenalis*)
15. Renal calices (*Calices renales*)
16. Left kidney (*Ren sinister*)
17. Ureter (*Ureter*)
18. Superior mesenteric (*A. mesenterica superior*)
19. Kidney vessels (*Vasa renalia*)
20. Tranverse muscle (*M. transversus abdominis*)
21. Quadrate muscle (*M. quadratus lumborum*)
22. Greater psoas muscle (*M. psoas major*)
23. Iliac muscle (*M. iliacus*)
24. Straight muscle (*M. rectus abdominis*)
25. Ligament of Hesselbach (*L. interfoveolare*)
26. Inguinal ring (*Annulus inguinalis*)

Plate 16 ATLAS OF HUMAN ANATOMY

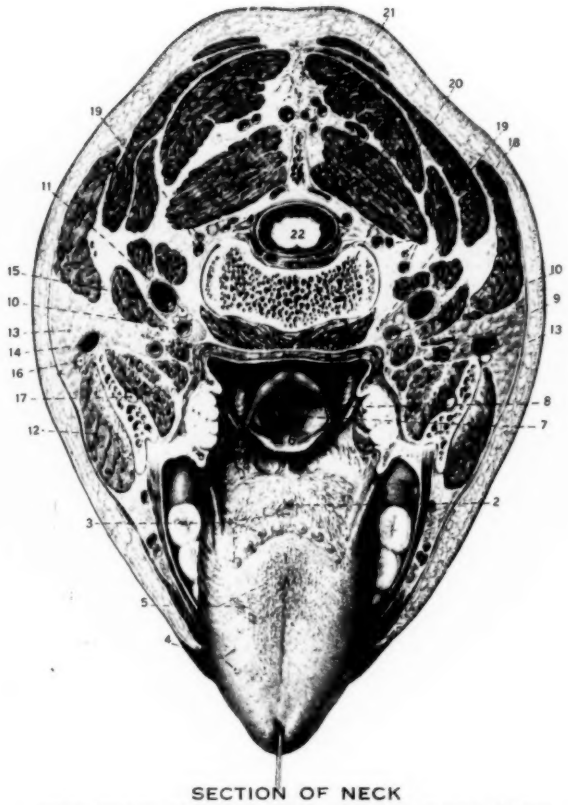
NAMES OF PARTS

1. Orifice of Stenson's duct *(Orificium ducti parotidei)*
2. Orifice of Wharton's duct *(Orificium ducti submaxillaris)*
3. Sub-Lingual gland *(Gl. sublingualis)*
4. Parotid gland *(Gl. parotis)*
5. Sub-maxillary gland *(Gl. submaxillaris)*
6. Epiglottis *(Epiglottis)*
7. Pharynx *(Pharynx)*
8. Vocal cord *(Plica vocalis)*
9. Larynx *(Larynx)*
10. Gullet *(Oesophagus)*
11. Gall-bladder *(Vesica fellea)*
12. Liver *(Hepar)*
13. Stomach *(Ventriculus)*
14. Pancreas *(Pancreas)*
15. Pylorus *(Pylorus)*
16. Orifice of Santorini duct *(Orificium ducti pancreatici accessorii)*
17. Splenic flexure of colon *(Flexura coli sinistra)*
18. Hepatic flexure of colon *(Flexura coli dextra)*
19. Orifice of bile and pancreatic ducts *(Orificium ducti choledochi et ducti pancreatici)*
20. Jejunum *(Intestinum jejunum)*
21. Ileum *(Intestinum ileum)*
22. Caecum and appendix *(Intestinum caecum et processus vermiformis)*
23. Sigmoid flexure of colon *(Flexura coli sigmoidea)*
24. Levator ani muscle *(M. levator ani)*
25. External sphincter ani muscle *(M. sphincter ani externus)*



ALIMENTARY TRACT

ATLAS OF HUMAN ANATOMY **Plate 17**



SECTION OF NECK

THE SECTION IS HORIZONTAL THROUGH SECOND CERVICAL VERTEBRA

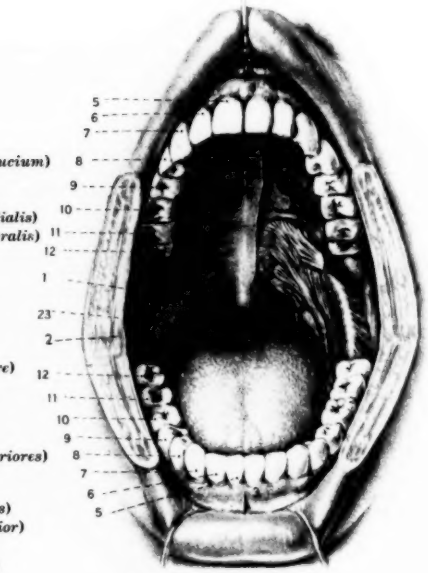
1. Dorsum of tongue (*Dorsum linguae*)
2. Foramen caecum (*Foramen caecum linguae*)
3. Circumvallate papillae (*Papillae vallatae*)
4. Fungiform papillae (*Papillae fungiformes*)
5. Filiform and conical papillae (*Papillae filiformes et conicae*)
6. Epiglottis (*Epiglottis*)
7. False vocal chord (*Plica ventricularis*)
8. True vocal chord (*Plica vocalis*)
9. External carotid (*A. carotis externus*)
10. Internal carotid (*A carotis internus*)
11. Right vagus (*N. vagus dexter*)
12. Masseter (*M. masseter*)
13. Parotid gland (*Gl. parotis*)
14. External jugular (*V. jugularis externa*)
15. Internal jugular (*V. jugularis interna*)
16. Facial (*N. facialis*)
17. Inferior dental (*N. alveolaris inferior*)
18. Superior cervical ganglion (*Ggl. cervicale superius*)
19. Vertebral artery and veins (*A. et. Vv. vertebrales*)
20. Second cervical vertebra (*Epistropheus*)
21. Trapezius (*M. trapezius*)
22. Spinal cord (*Medulla spinalis*)

Plate 18 ATLAS OF HUMAN ANATOMY

THE MOUTH AND JAW REGION

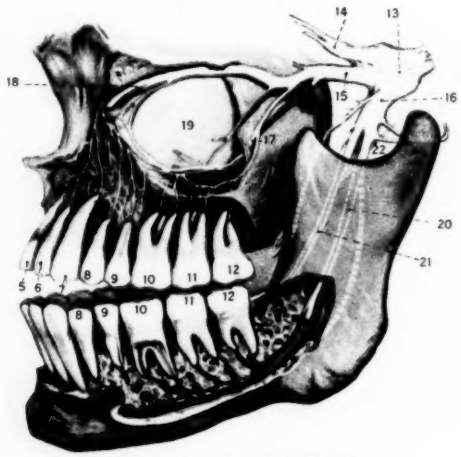
NAMES OF PARTS

1. Uvula (*Uvula*)
2. Posterior wall pharynx (*Isthmus faucium*)
3. Gums (*Gingivae*)
4. Soft palate (*Palatum molle*)
5. Middle incisor (*Dens incisivus medialis*)
6. Lateral incisor (*Dens incisivus lateralis*)
7. Canine (*Dens caninus*)
8. Premolars (*Dentes praemolares*)
9. Bicuspids (*Dentes praemolares*)
10. Molars (*Dentes molares*)
11. Molars (*Dentes molares*)
12. Wisdom (*Dens serotinus*)
13. Gasserian ganglion (*Ggl. semilunare*)
14. Ophthalmic (*N. ophthalmicus*)
15. Maxillary (*N. maxillaris*)
16. Mandibular (*N. mandibularis*)
17. Posterior superior dental (*Rami alveolares superiores posteriores*)
18. Infraorbital (*N. infraorbitalis*)
19. Mucous membrane of antrum (*Tunica mucosa, sinus maxillaris*)
20. Inferior dental (*N. alveolaris inferior*)
21. Lingual (*N. lingualis*)
22. Chorda tympani (*Chorda tympani*)
23. Tonsil (*Tonsilla*)



THE MOUTH CAVITY

CHEEKS HAVE BEEN CUT TO ALLOW DISTENTION OF JAWS



UPPER AND LOWER JAWS

LATERAL VIEW

THE NERVES OF THE TEETH ARE SHOWN IN THE UPPER JAW AND THE BLOOD VESSELS IN THE LOWER

ATLAS OF HUMAN ANATOMY **Plate 19**

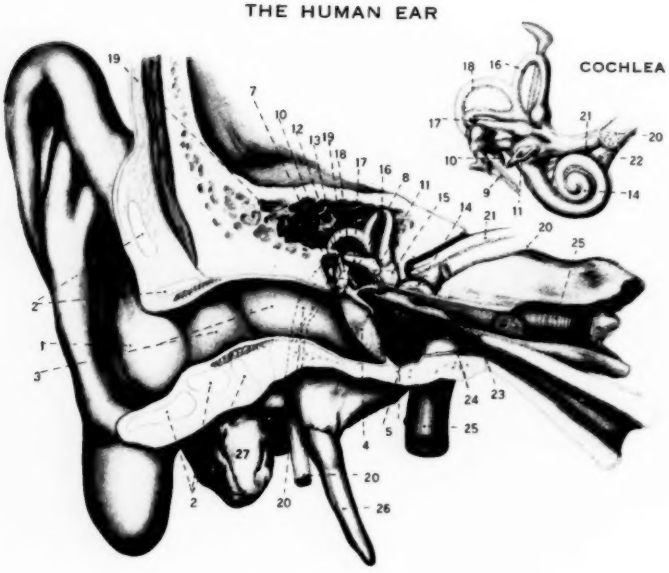
SECTION OF NECK
CORONAL
THIS VIEW IS FROM BEHIND. THE PHARYNX HAS BEEN CUT OPEN

NAMES OF PARTS

1. Mucous membrane of esophagus (*Tunica mucosa oesophagi*)
2. Epiglottis (*Epiglottis*)
3. Tongue (*Lingua*)
4. Posterior nares (*Choanae*)
5. Eustachian tube (*Ostium pharyngeum tubae auditivae*)
6. Uvula (*Uvula*)
7. Tonsil (*Tonsilla*)
8. Circumvallate papillae (*Papillae vallatae*)
9. External carotid (*A. carotis externa*)
10. Internal carotid (*A. carotis interna*)
11. Superior thyroid (*A. thyreoidea superior*)
12. Common carotid ((*A. carotis communis*)
13. Parathyroid gland (*Glandula parathyreoidea*)
14. Right vagus (*N. vagus dexter*)
15. Inferior thyroid (*A. thyroidea inferior*)
16. Recurrent (*N. recurrens*)
17. Left lobe of thyroid gland (*Lobus sinister glandulae thyreoideae*)
18. Inferior laryngeal (*N. laryngeus inferior*)
19. Aryepiglotticus (*M. ary-epiglotticus*)
20. Superior laryngeal (*N.laryngeus superior*)
21. Stylo-pharyngeus (*M. stylo-pharyngeus*)
22. Root of tongue (*Radix linguae*)
23. Superior constrictor pharynx (*M. constrictor pharyngis superior*)
24. Salpingo pharyngeus (*M. salpingopharyngeus*)
25. Levator palate (*M. levator veli palatini*)

Plate 20 ATLAS OF HUMAN ANATOMY

THE HUMAN EAR

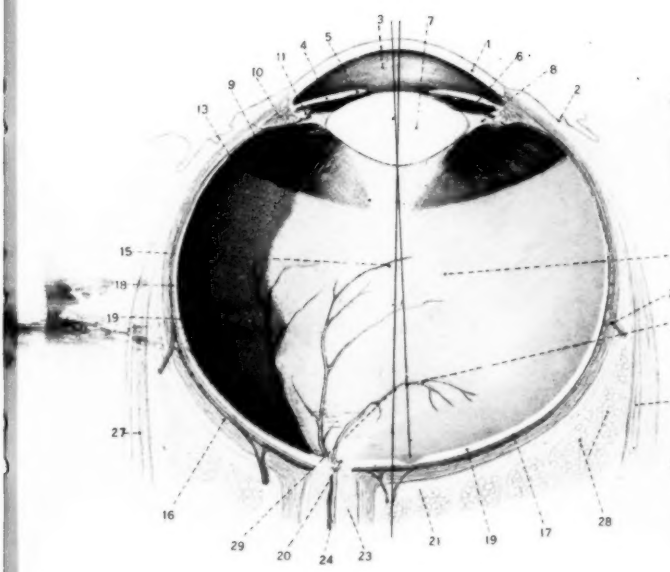


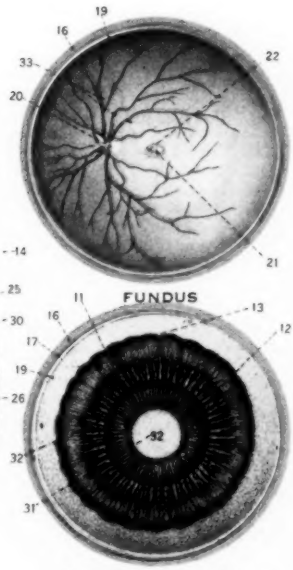
NAMES OF PARTS

1. External ear (*Auricula*)
2. Cartilage of auricle (*Cartilago auriculae*)
3. External auditory meatus (*Meatus acousticus externus*)
4. Ear drum (*Membrana tympani*)
5. Tympanic cavity (*Cavum tympani*)
6. Promontory (*Promontorium*)
7. Epitympanic recess (*Recessus epitympanicus*)
8. Superior recess of tympanic membrane (*Recessus membranae tympani superior*)
9. Hammer (*Malleus*)
10. Anvil (*Incus*)
11. Stirrup (*Stapes*)
12. Lateral ligament of hammer (*L. mallei laterale*)
13. Superior ligament of hammer (*L. mallei superius*)
14. Cochlea ((*Cochlea*)
15. Vestibule (*Vestibulum*)
16. Superior semicircular canal (*Canalis semicircularis superior*)
17. Lateral semicircular canal (*Canalis semicircularis lateralis*)
18. Posterior semicircular canal (*Canalis semicircularis posterior*)
19. Tympanic antrum (*Antrum tympanicum*)
20. Facial nerve (*N. facialis*)
21. Vestibular nerve (*N. Vestibularis*)
22. Cochlear nerve (*N. cochlearis*)
23. Tensor of tympanum (*M. tensor tympani*)
24. Bony part of Eustachian tube (*Pars ossea tubae auditivae*)
25. Internal carotid (*A. carotis interna*)
26. Styloid process (*Processus styloideus*)
27. Mastoid process (*Processus mastoideus*)

Atlas of Human Anatomy Plate 21

LEFT HUMAN EYE
SECTION





ANTERIOR HALF OF EYE
VIEWED FROM BEHIND

NAMES OF PARTS

1. Cornea (*Cornea*)
2. Conjunctiva (*Conjunctiva bulbi*)
3. Anterior chamber (*Camera oculi anterior*)
4. Iris (*Iris*)
5. Sphincter of pupil (*Sphincter pupillae*)
6. Posterior chamber (*Camera oculi posterior*)
7. Crystalline lens (*Lens crystallina*)
8. Ciliary zonule (*Zonula ciliaris*)
9. Ciliary body (*Corpus ciliare*)
10. Ciliary muscle (*M. ciliares*)
11. Ciliary processes (*Processus ciliares*)
12. Ciliary folds (*Plicae ciliares*)
13. Serrated edge (*Ora serrata*)
14. Vitreous body (*Corpus vitreum*)
15. Hyaloid canal (*Canalis hyaloideus*)
16. Sclera (*Sclera*)
17. Choroid (*Choroidea*)
18. Pigment layer retina (*Stratum pigmenti retinae*)
19. Retina (*Retina*)
20. Excavation of papilla (*Excavatio papillae nervi optici*)
21. Central fovea (*Fovea centralis*)
22. Yellow spot (*Macula lutea*)
23. Optic nerve (*N. opticus*)
24. Central vessels (*Vasa centralia retinae*)
25. Vortex vein (*V. vorticosa*)
26. Lateral straight muscle (*M. rectus oculi lateralis*)
27. Medial straight muscle (*M. rectus oculi medialis*)
28. Fat of orbit (*Corpus adiposum orbitae*)
29. Optic axis (*Axis optica*)
30. Line of vision (*Linea visus*)
31. Pupil (*Pupilla*)
32. Posterior surface of iris (*Facies posterior iridis*)
33. Vessels of retina (*Vasa sanguinea retinae*)

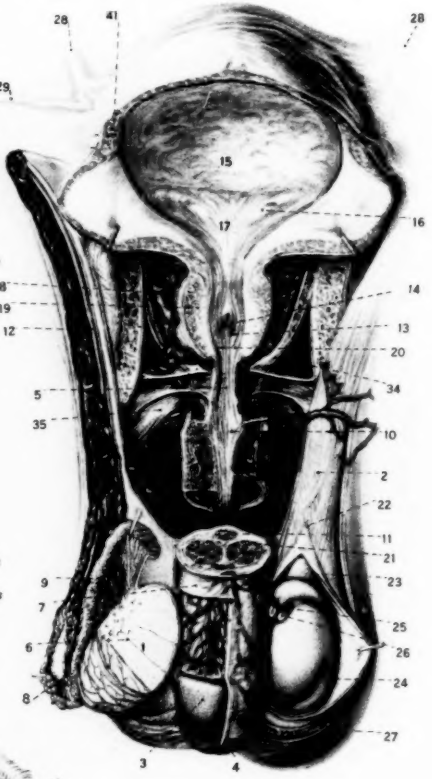
Plate 22 ATLAS OF HUMAN ANATOMY

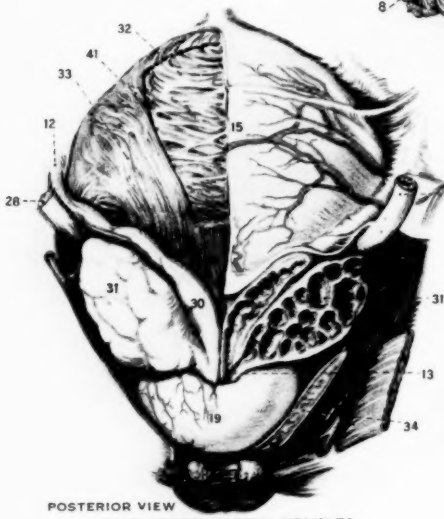
UROGENITAL ORGANS—MALE

55

NAMES OF PARTS

1. Testicle (*Testis*)
2. Spermatic cord (*Funiculus spermaticus*)
3. Glans (*Glans penis*)
4. Foreskin (*Praeputium*)
5. Membranous urethra (*Pars membranacea urethrae*)
6. Inner structure testis (*Parenchyma testis*)
7. Penis (*Penis*)
8. Epididymis (*Epididymis*)
9. Efferent ducts (*Ductuli efferentes testis*)
10. Duct Cowper's gland (*Ductus excretorious glandulae bulbo-urethralis*)
11. Spongy body (*Corpus cavernosum urethrae*)
12. Vas deferens (*Ductus deferens*)
13. Ejaculatory duct (*Ductus ejaculatorius*)
14. Prostatic utricle (*Utriculus prostaticus*)
15. Bladder (*Vesica urinaria*)
16. Ureteral orifice (*Orificium ureteris*)
17. Triangle of bladder (*Trigonum vesicae*)
18. Venous plexus of prostate (*Plexus prostaticus*)
19. Prostate (*Prostata*)
20. Orifices prostatic ducts (*Orificia ductuli prostatici*)
21. Cavernous body of penis (*Corpus cavernosum penis*)
22. Tunica vaginalis communis (*Tunica vaginalis communis*)
23. Parietal tunica vaginalis (*Tunica vaginalis propria testis—lamina parietalis*)
24. Visceral tunica vaginalis (*Tunica vaginalis propria testis—lamina visceralis*)
25. Appendix epididymis (*Appendix epididymidis*)



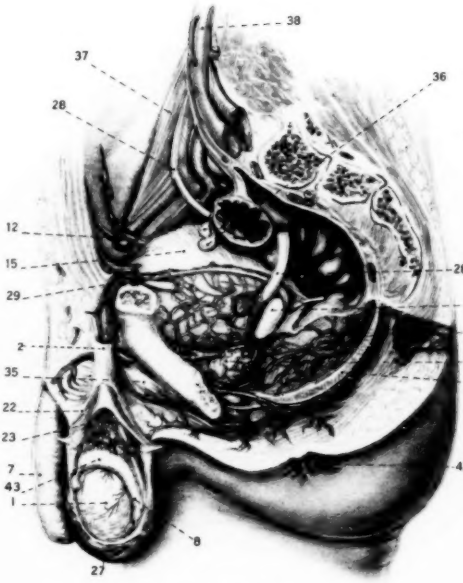


POSTERIOR VIEW OF BLADDER SEMINAL VESICLES, PROSTATE, AND VAS DEFERENS

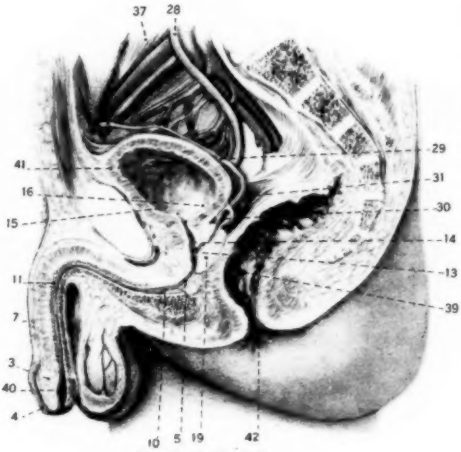
26. Appendix testis (*Appendix testis—Morgagnii*)
27. Skin (*Cutis*)
28. Ureter (*Ureter*)
29. Vas deferens (*Ductus deferens*
30. Ampulla of vas (*Ampulla ductus deferentis*)
31. Seminal vesicle (*Vesicula seminalis*)
32. Middle muscular coat of bladder (*Tunicae muscularis stratum medium*)
33. Superficial muscular coat (*Tunicae muscularis stratum externum*)
34. Levator ani muscle (*M. levator ani*)
35. Ischio-cavernosous muscle (*M. ischio-cavernosus*)
41. Muscular coat of bladder (*Tunica muscularis*)

ATLAS OF HUMAN ANATOMY **Plate 23**

UROGENITAL ORGANS—MALE



LEFT HALF OF PELVIS
SAGITTAL SECTION SHOWING GENITO-URINARY TRACT



THE PELVIS
MEDIAN SAGITTAL SECTION SHOWING GENITO-URINARY TRACT

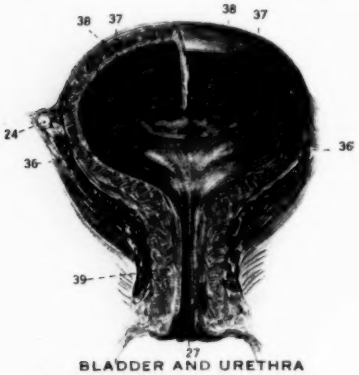
NAMES OF PARTS

1. Testicle (*Testis*)
2. Spermatic cord (*Funiculus spermaticus*)
3. Glans (*Glans penis*)
4. Foreskin (*Praeputium*)
5. Membranous urethra (*Pars membrana urethrae*)
7. Penis (*Penis*)
8. Epididymis (*Epididymis*)
10. Duct Cowper's gland (*Ductus excretorius glandulae bulbo-urethralis*)
11. Spongy body (*Corpus cavernosum urethrae*)
12. Vas deferens (*Ductus deferens*)
13. Ejaculatory duct (*Ductus ejaculatorius*)
14. Prostatic utricle (*Utriculus prostaticus*)
15. Bladder (*Vesica urinaria*)
16. Ureteral orifice (*Orificium ureteris*)
19. Prostate (*Prostata*)
22. Tunica vaginalis communis (*Tunica vaginalis communis*)
23. Parietal tunica vaginalis (*Tunica vaginalis propria testis-lamina parietalis*)
27. Skin (*Cutis*)
28. Ureter (*Ureter*)
29. Vas deferens (*Ductus deferens*)
30. Ampulla of vas (*Ampulla ductus deferentis*)
31. Seminal vesicle (*Vesicula seminalis*)
34. Levator ani muscle (*M. levator ani*)
35. Ischio-cavernosus muscle (M. *ischio cavernosus*)
36. Epiploic appendages (*Appendices epiploicae*)
37. Psoas muscle (*M. psoas*)
38. Abdominal aorta (*A. aorta abdominalis*)
39. Rectum (*Intestinum rectum*)
40. Fossanavicularis (*Fossa navicularis*)
41. Muscular coat of bladder (*Tunica muscularis*)
42. Anus (*Anus*)
43. Head of epididymis (*Caput epididymidis*)

Plate 24 ATLAS OF HUMAN ANATOMY

UROGENITAL ORGANS—FEMALE

UTERUS, BLADDER AND EXTERNAL GENITALIA
THE LEFT HALF IS DISSECTED TO DISPLAY THE INTERNAL STRUCTURE



BLADDER AND URETHRA
CUT OPEN TO SHOW INTERIOR ANTERIOR

NAMES OF PARTS

1. Ampulla of tube (*Ampulla tubae uterinae*)
2. Fimbriae (*Fimbriae tubae*)
3. Suspensory ligament of ovary (*L. suspensorium ovarii*)
4. Ovary (*Ovarium*)
5. Meso-salpinx (*Mesosalpinx*)
6. Corpus luteum (*Corpus luteum*)
7. Utero-ovarian ligament (*L. ovarii proprium*)
8. Uterus (*Uterus*)
9. Serous coat (*Tunica serosa*)
10. Muscular coat (*Tunica muscularis*)
11. Mucous coat (*Tunica mucosa*)
12. Uterine end of tube (*Ostium uterinum tubae*)
13. Fallopian tube (*Tuba uterina*)
14. Ovarian artery and vein (*A. et. V. ovarii*)
15. Hydatid of Morgagni (*Appendix vesiculosa*)
16. Graafian follicle (*Folliculus oophorus vesiculosus*)
17. Primordial follicles (*Folliculi oophorii primarii*)
18. Corpus albicans (*Corpus albicans*)
19. Ureter (*Ureter*)
20. Cervix (*Cervix uteri*)
21. Vagina (*Vagina*)
22. Symphysis pubis (*Symphysis ossium pubis*)
23. Bladder (*Vesica urinaria*)
24. Lateral umbilical ligament (*L. umbilicale laterale*)
25. Prepuce (*Praeputium clitoridis*)
26. Glans (*Glans clitoridis*)
27. External urethral orifice (*Orificium urethrae externum*)
28. Labium majus (*Labium majus pundendi*)
29. Labium minus (*Labium minus pudendi*)
30. Vaginal orifice (*Orificium vaginae*)
31. Bartholin's gland (*Orificium glandulae vestibularis*)
32. Fossa navicularis (*Fossa navicularis*)
33. Fourchette (*Frenulum labiorum pudendi*)
34. Anus (*Anus*)
35. Bulb (*Bulbus vestibuli*)
36. Ureteral orifice (*Orificium ureteris*)
37. Middle muscle layer (*Tunicae muscularis stratum medium*)
38. Superficial muscle layer (*Tunicae muscularis stratum externum*)
39. Skene's gland (*Glandula urethralis*)

PRODUCTS LIABILITY INSURANCE—(Continued from Page 50)

ever, the Wisconsin courts have permitted an injured party to recover against a manufacturer or vendor with whom he had no contractual relationship. In *Bright v. Barnett & Record Co.*,[46] a contractor built a scaffold which caused injury to an employee of the purchaser. The court permitted recovery against the contractor by the representatives of the decreased.[47]

In *Hasbrouck v. Armour & Co.*,[48] the plaintiff was injured by a needle in a cake of soap. Recovery against the manufacturer was denied because the manufacturer did not know of the needle.

In *Haley v. Swift & Co.*,[49] a manufacturer sold contaminated sausage which made an infant ill. The court permitted recovery.

In *Coakley v. Prentiss-Wabers Stove Co.*,[50] a kerosene stove was defectively manufactured and while it was being used, it exploded. The injured person was permitted to recover against the manufacturer.

The *Bright* case was not followed in *Zieman v. Kieckhefer Elevator Mfg. Co.*,[51] which involved an injury on an elevator under construction.[52]

In *Kerwin v. Chippewa Shoe Mfg. Co.*,[53] the defendant negligently manufactured a shoe by leaving a nail protruding through its sole. The court denied recovery to the purchaser of the shoe upon the ground that the defect was obvious to the purchaser.

In the Wisconsin counterpart of the *MacPherson* case, *Flies v. Fox Brothers Buick Co.*,[54] the court permitted recovery for a defective automobile which had been sold and which caused personal injuries to the plaintiff while it was being operated by the purchaser.

Until the decision in *Marsh Wood Products Co. v. Babcock & Wilcox Co.*,[55] the liability of the manufacturer for negligent manufacture had been confined to personal injuries sustained by a person who had no contractual relationship with the manufacturer. The court in the *Marsh Wood* case[56] held that the manufacturer was liable for property damage caused by the explosion of a defective boiler.

In *Cohan v. Associated Fur Farms, Inc.*,[57] the court extended the doctrine of the *Marsh Wood* case to animals. In that case, the defendant sold contaminated pork livers which the plaintiff fed to mink. The court permitted recovery against the vendor.

The above cited cases in the history of the development of liability of the manufacturer and vendor do not furnish a basis for the conclusion that a manufacturer or vendor is a guarantor of the safety of use of the goods or products. For example, in *Beznor v. Howell*,[58] a sparkler ignited a child's dress and caused serious personal injuries. Recovery was refused upon the ground that the article when properly used was not dangerous.

In *Yaun v. Allis-Chalmers Mfg. Co.*,[59] the court refused to hold that a roto hay baler had been negligently designed or negligently manufactured. This case is in line with the decisions in other states, such as *Campo v. Scofield*,[60] where the court refused to permit recovery for injuries caused through the operation of an onion topping machine because the dangers in the operation of the machine were perfectly apparent to the user.

It should be remembered that the complaint in an action against a manufacturer or vendor must specify the ground of negligence upon which the plaintiff relies. In *DeWitz v. Northern States Power Co.*,[61] the court refused recovery for wrongful death resulting from a gas explosion upon the ground that the complaint failed to allege the grounds of negligence upon which the plaintiff relied and because these questions of negligence were not submitted to the jury in the special verdict. Finally, we must not overlook the fact that a buyer may purchase an article on an "as is" basis. In such event, the buyer cannot recover for

[46]88 Wis. 299, 60 N.W. 418 (1894). See BOHLEN, STUDIES IN THE LAW OF TORTS 149, 153 (1926).

[47]The court cited and followed Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892), and Devlin v. Smith, 89 N.Y. 470 (1882). Compare Massey v. F. H. McGraw & Co., 233 F.2d 905 (6th Cir. 1956). Arthur v. Standard Engineering Co., 193 F.2d 903, 32 A.L.R.2d 408 (D.C. Cir. 1951).

[48]139 Wis. 357, 121 N.W. 157 (1909).

[49]152 Wis. 570 140 N.W. 292 (1913).

[50]182 Wis. 94, 195 N.W. 388 (1923).

[51]90 Wis. 497, 63 N.W. 1021 (1895).

[52]See BOHLEN, STUDIES IN THE LAW OF TORTS, 140, 153 (1926). The court also refused to follow the *Bright* case in Miller v. Mead-Morrison Co., 166 Wis. 536, 166 N.W. 315 (1918).

[53]163 Wis. 428, 157 N.W. 1101 (1916).

[54]196 Wis. 196, 207; 218 N.W. 855, 859 (1928).

[55]207 Wis. 209, 240 N.W. 392 (1932).

[56]*Id.* at 226, 240 N.W. at 399.

[57]261 Wis. 584, 53 N.W.2d 788 (1952).

[58]203 Wis. 1, 233 N.W. 758 (1930).

[59]253 Wis. 558, 34 N.W.2d 853 (1948).

[60]301 N.Y. 468, 95 N.E.2d 802 (1950).

[61]269 Wis. 548, 69 N.W.2d 431 (1955). To the same effect, Cohan v. Associated Fur Farm, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952).

a defect in the article purchased.[62]

Our discussion of the liability of a manufacturer and dealer for the negligent manufacture, preparation and sale of goods and products would not be complete if we failed to call attention to the decisions of the courts permitting recovery after a long lapse of time. As we have previously pointed out, the products liability-completed operations coverage applies only to an accident or occurrence which takes place during the policy period. It is imperative therefore that every manufacturer and every dealer shall continue his insurance in force until there is no longer any possibility of a recovery against him. The citations which follow are typical of a long list of recent decisions.[63]

In *Lill v. Murphy Door Bed Co.*,[64] the court allowed recovery for damages caused by a bed which broke after it had been used for several years.

The general trend of authority is indicated by the decision in *Ryan v. Zweck-Wollenberg Co.*[65] In that case, the plaintiff's son-in-law purchased the Philco refrigerator, alleged to have injured the plaintiff, in April, 1949. Although the accident happened on March 6, 1952, three years later and after the refrigerator had been moved once, recovery was allowed. We anticipate that where similar electric appliances have hermetically sealed units, the Wisconsin Supreme Court will permit recovery even where there is a great lapse of time between the date of purchase and the date of the accident or occurrence.

Liability Of A Manufacturer And Vendor Based Upon Breach Of Warranty

At the present time, the rule in Wisconsin is that there can be no recovery for breach of warranty unless there is privity of contractual relations between the parties. In *Cohan v. Associated Fur Farms, Inc.*,[66] the plaintiff, Cohan, brought an action against Associated Fur Farms, Inc. to recover damages for contaminated frozen pork livers which he fed to his mink and which caused the deaths of some of the minks. Associated Fur Farms, Inc. interpleaded Armour & Co. The plaintiff then amended his complaint and Armour & Co. demurred to the amended complaint. The question was whether Cohan could recover against Armour & Co. upon the basis of a breach of warranty. In holding that Cohan could not recover against Armour & Co., the court said:[67]

> Armour demurred generally to the amended complaint upon the ground that it fails to allege privity of contract between it and plaintiff. The demurrer was sustained. We construe the amended complaint as pleading a cause of action only for breach of warranty. To permit recovery for breach of warranty by an ultimate buyer against the manufacturer or processor of an article of food there must be privity of contractual relations between them. *Prinsen v. Russos*, 194 Wis. 142, 215 N.W. 905, 22 Am. Jur., Food, p. 890, sec. 103. It is lacking here, and therefore the amended complaint does not state a cause of action for breach of warranty.

Wisconsin thus follows the minority rule which has been severely criticized.[68]

The trend of modern decisions is definitely toward permitting recovery against the manufacturer even though there is absent any contractual relationship between the injured party and the manufacturer. A typical example is *Bahlman v. Hudson Motor Car Co.*[69] In that case an automobile salesman warranted a unisteel top on an automobile which would be smooth and not contain any sharp projections. The automobile, in fact, was jagged on the inside. The car overturned and the purchaser was severely injured because of the jagged condition of the top. The court permitted recovery because of the breach of the warranty.

Recently, plaintiffs have brought suit against a retailer because of a breach of an implied warranty on account of the defective condition of articles which the dealer sells in the original carton or package, and which he does not inspect. A typical case is *American Indemnity Company v. Sears, Roebuck & Co.*[70] In that case, Sears

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[62]Pokrajac v. Wade Motors, Inc., 266 Wis. 398, 63 N.W.2d 720 (1954). In this case the buyer purchased an automobile with defective brakes. See 1956 Wis. L. Rev. 15.

[63]*Report of Casualty Committee*, 23 Ins. Counsel J. 33 (1956), contains a comprehensive analysis of such decisions.

[64]290 Ill.App. 328, 8 N.E.2d 714 (1937).

[65]266 Wis. 630, 64 N.W.2d 226 (1954).

[66]261 Wis. 584, 53 N.W.2d 788 (1952).

[67]*Id.* at 589, 53 N.W.2d at 791.

[68]*Liability of a Manufacturer of Chattels to Persons Other Than Immediate Purchasers on the Theory of Warranty, Report of Casualty Committee*, 22 Ins. Counsel J. 431 (1955). Hall, *Sales —"From Status to Contract?"* 1952 Wis. L. Rev. 209, 216.

[69]290 Mich. 683, 288 N.W. 309 (1939).

[70]195 F.2d 353 (6th Cir. 1952).

purchased furnaces from the Samuel Stamping & Enameling Co. and warranted the furnaces to be suitable for the purpose for which they were intended. One of the furnaces was defective and as a consequence, a woman and her son were asphyxiated. The husband and father brought action against Sears, Roebuck & Co., who tendered the defense to the American Indemnity Company which had issued the policy to Sears, Roebuck & Co. The insurance company refused the tender. Thereupon, Sears, Roebuck & Co. arranged a settlement with the husband and father and then brought an action against the insurance company. The court held that there could be recovery against Sears, Roebuck & Co. on the basis of warranty.

The insurance policy contained a provision denying coverage with respect to any express warranty of Sears, Roebuck & Co. which was unauthorized by Samuel Stamping & Enameling Co. There was also in this case an endorsement to the manufacturer's policy providing coverage to a retailer who sold the product of the manufacturer. This decision points up the necessity in many cases for a retailer to insist that the manufacturer protect him by a dealers' endorsement to the manufacturer's policy. In the event such endorsement excludes coverage for warranties made by the dealer which are not authorized by the manufacturer, the dealer must be vigilant to see that no warranty is made which is unauthorized by the manufacturer.

We see no escape from the conclusion that a retailer will be liable to a purchaser or third person where there is an implied warranty under section 121.15 of the Wisconsin Statutes.[71] Under an identical statute, the Court of Appeals of the District of Columbia in *Frank R. Jelleff, Inc. v. Braden*,[72] held that there was an implied warranty of fitness for the use intended for the article sold. In that case, a retailer in the District of Columbia sold a brunch coat to a woman which was made of a highly inflammable material. While the purchaser was wearing the coat, it ignited and caused serious personal injury. The District of Columbia had a statute similar to section 121.15 of the Wisconsin Statutes. The purchaser brought an action against the retailer based upon an alleged breach of warranty of fitness. In permitting the plaintiff to recover, the court said:[73]

> In the circumstances disclosed, the retailer must have assumed some risk of loss which in due course could be passed back to the manufacturer, as indeed Jelleff's has actually sought to do. Such losses, no doubt, are part of the cost of doing business, not to be borne by an injured customer alone, but by those who profit from the transaction. The industry as a whole may be deemed to underwrite the implied warranty. That is why we have the statute on which the action was based.[74]

Before leaving this subject, we wish to afford some solace to the manufacturer and dealer. It is now well established that contributory negligence is a good defense in an action for breach of implied warranty.[75] Contributory negligence, however, is not a complete defense because of the comparative negligence statute.[76]

Liability Based on Misrepresentation

The distinction between a warranty, either express or implied, and a misrepresentation is in many cases difficult to draw. The courts, however, have definitely discussed the liability of a manufacturer or a dealer in terms of misrepresentations. The distinction appears rather clearly in *Hoar v. Rasmusen*,[77] which was an action brought against a druggist. The plaintiff had an allergy for mercury. A physician prescribed an ointment without mercury. The plaintiff's wife took the prescription to a druggist who wanted to save time and money and who sold a commercial ointment which contained a minute amount of mercury. A physician, but not the one who wrote the prescription, called the druggist and asked him whether the ointment had mercury in it. The druggist falsely stated that the oint-

[71] WIS. STAT. § 121.15 (1) (1955) provides:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an emplied warranty that the goods shall be reasonably fit for such purpose."

[72] 233 F.2d 671 (D.C.Cir. 1956).

[73] *Id.* at 680-81.

[74] For an interesting discussion of implied warranty, see Judge Tehan's opinion in Standard Brands, Inc. v. Consolidated Badger Coop., 89 F. Supp. 5 (E.D.Wis. 1950).

[75] Nelson v. Anderson, 245 Minn. 445, 72 N.W.2d 861 (1955); Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955); 23 J. AIR L. & COM. 108 (1956); Comment, 1953 WIS. L. REV. 109.

[76] WIS. STAT. § 331.045 (1955).

[77] 229 Wis. 509, 282 N.W. 652 (1938).

ment did not have mercury when he knew that it did in fact have mercury. Following the doctor's instructions, the patient smeared the ointment over his whole body, and because of the mercury was incapacitated for several months. The court permitted recovery against the druggist.[78]

In *Reed Roller Bit Co. v. Pacific Employers Insurance Co.*[79] a salesman represented that an emery wheel could be used with a certain machine. On the strength of the representation, the employer purchased the emery wheel. When used on the machine, the emery wheel disintegrated and caused severe injuries to the plaintiff, who was an employee of the purchaser of the emery wheel. The court permitted recovery on the basis of misrepresentation.

In *Quirici v. Freeman,*[80] a salesman represented primer paint to be suitable for the purpose intended. The purchaser used the primer as directed, but in six months the paint peeled off. The court permitted recovery for the mispresentation.

It is still an open question in Wisconsin whether the operator of a restaurant or hotel serving food to customers on the restaurant or hotel premises sells a service or sells food. In *Prinsen v. Russos,*[81] the court stated that it was unnecessary for it to determine in that case whether the restaurant proprietor who served contaminated sandwiches sold a service or sold food. The court commented upon the fact that there were two lines of authority, one holding that the furnishing of food was a sale of a service and the other holding that the serving of food constituted a sale under the Uniform Sales Act. We have discussed the applicable provisions of the Sales Act in a preceding section of this article.[82]

The Attorney General of Wisconsin, in discussing the legal effect of the furnishing of food on the premises has said:[83]

> It is the majority view that where food is served to a person for immediate consumption for a stipulated price, the transaction is a sale and not a service, although there is a sharp conflict in the authorities on this point with a minority holding that the serving of meals is a service and not a sale. 7 A.L.R. 2d 1032; 18 N.C.C.A. (n.s.) 573, 595. The Wisconsin Supreme Court has expressly left this question open in *Prinsen v. Russos* (1927), 194 Wis. 142, 146, 215 N.W. 905. However, in view of the trend of decisions elsewhere it seems probable that in a proper case the Wisconsin Supreme Court will hold that the transaction is a sale and not a service.

There are two facets of the problem. One is the situation in which a restaurant or hotel proprietor is negligent with respect to the preparation and serving of the food. The other is the situation in which a restaurant or hotel proprietor purchases food in bulk which is not capable of being inspected and which contains deleterious substances or is contaminated. *Zorinsky v. The American Legion*[84] was a case involving an injury to a customer of the Omaha Post who sustained injuries while eating sherbert. The Post purchased the sherbert in bulk containers. There was no negligence on the part of the Post in serving the sherbert. The question was whether there was a sale of the sherbert in which event there was a breach of an implied warranty of fitness. The court stated that there were two rules in the United States which might be applied. One rule was the Connecticut-New Jersey minority rule. The majority rule was the Massachusetts-New York rule which the court stated to be as follows:[85]

> [A] restauranteur engaged in serving food to paying guests for immediate consumption on the premises impliedly warrants that the food so served is wholesome and fit for human consumption, and is liable for injuries to such guests proximately caused by a breach thereof without proof of negligence, although he may be liable for actionable negligence if the same is supported by competent evidence.

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[78]The court cited and relied upon RESTATEMENT, TORTS § § 291, 310 (1934). A druggist is liable to the same extent as any other dealer. In the early case of Kennedy v. Plank, 120 Wis. 197, 97 N.W. 895 (1904), the purchaser asked for a remedy for his horses. The druggist, by mistake, did not give the purchaser the proper remedy but instead gave a poison. The purchaser administered the poison to the horses, one of which became ill and the other died. The druggist was held liable for the damages.

[79]198 F.2d 1 (5th Cir. 1952).

[80]98 Cal. App. 2d 194, 219 P.2d 897 (1950).

[81]194 Wis. 142, 215 N.W. 905 (1927). For an interesting discussion of the extent of the warranty concept to service-sales contracts, see 31 IND. L.J. 367 (1956).

[82]See note 71 *supra.*

[83]44 OPS. WIS. ATT'Y GEN. 17, 18 (1955).

[84]163 Neb. 212, 79 N.W.2d 172 (1956).

[85]*Id.* at —, 79 N.W.2d at 176. Annot., 7 A.L.R.2d 1027, 1032 (1949) analyzes the cases which follow the minority and majority views.

Here again, we suggest that the restaurant or hotel proprietor insist that the supplier obtain a dealer endorsement to their products liability policy broad enough to indemnify the hotel or restaurant proprietor against liability for deleterious substances in the bulk food products purchased.

Liability For Completed Operations

"The general rule is that an independent contractor is relieved from responsibility to persons for injuries suffered by them after he has completed his work and it has been accepted by his principal."[86]

One exception to the rule is that if the thing constructed is inherently or imminently dangerous, the contractor is liable for the damages caused by the instrumentality. Thus, in *Bright v. Barnett & Record Co.*,[87] a contractor built and sold a defective scaffold which caused the death of an employee of the person purchasing the scaffold. The court allowed the personal representative to recover from the contractor.

In *Hale & DePaoli*,[88] the contractor was held liable to third persons for defects in the house which he had constructed for the owner.

There is another exception where the work as completed constitutes a nuisance.[89]

The modern trend concerning completed work is mirrored in *Russell v. Arthur Whitcomb, Inc.*[90] In that case, the court held that a subcontractor was liable for negligent work after the work had been accepted by the employer, which, in that case, was a municipality.

The magnitude of the potential liability of a contractor is illustrated in *Foley v. Pittsburgh-Des Moines Co.*[91] and *Moran v. Pittsburgh-Des Moines Steel Co.*,[92] which grew out of the explosion of a gas tank at Cleveland, Ohio. In 1942, the contractor commenced the construction of a tank for liquefying gas and holding it at the temperature of minus 258° F. The tank was in the shape of a cylinder, approximately 76 feet in diameter and 50 feet high. After the tank had been used successfully for thirteen months, it exploded on October 20, 1944. The liquefying gas expanded at the ratio of 600 to 1, spread rapidly over the area where it was located, took fire and caused property damage in excess of $5,000,000 and the loss of over 100 lives.[93] Two hundred law suits were filed in Ohio and Pennsylvania, about half of which were brought against the Pittsburgh-Des Moines Co., the designer and constructor of the storage tank. In both cases, the court permitted recovery for the personal injuries, deaths and property damage.

Liability For Injuries To Persons With Allergies

The general rule is that a manufacturer or dealer is not liable for injury to a person with an allergy. For example, in *Bennett v. Pilot Products Co.*[94] a beauty parlor operator was not allergic to curling fluid or to fixative powder individually, but was allergic to the combination. The court refused to permit recovery against the manufacturer.[95]

There is an exception to the general rule where the dealer knows that some people will be affected by the article because of unusual susceptibility of such persons to the article. In such a case, the courts generally hold that there is a duty to warn purchasers of the dangers of such unusual susceptibility.[96]

The decisions make it imperative that the manufacturer and dealer alike conduct tests to be sure that a warning is given in all cases where there is a possibility of unusual susceptibility to injury through the use of an article. Decisions throughout the country indicate that liability of the manu-

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[86]Delaney v. Supreme Investment Co., 251 Wis. 374, 382, 29 N.W.2d 754, 758 (1947); Schumacker v. Carl G. Neumann D. & I. Co., 206 Wis. 220, 223-24, 239 N.W. 459, 460 (1931).

[87]88 Wis. 299, 60 N.W. 418 (1894).

[88]33 Cal.2d 228, 201 P.2d 1 (1948). Annot., 13 A.L.R.2d 191 (1950) contains a comprehensive analysis of the cases on the subject. To the same effect, see Caporaletti v. A-F Corp., 137 F.Sup. 14 (D.C. 1956).

[89]Delaney v. Supreme Investment Co., 251 Wis. 374, 382, 29 N.W.2d 754, 758 (1947); Schumacher v. Carl G. Neumann D. & I. Co., 206 Wis. 220, 224, 239 N.W. 459, 460 (1931); Nemet v. Kenosha, 169 Wis. 379, 172 N.W. 711 (1919).

[90]121 A.2d 781 (N.H. 1956). See PROSSER, TORTS § 85, at 519 (2d ed. 1955).

[91]363 Pa. 1, 68 A.2d 517 (1949).

[92]166 F.2d 908 (3rd Cir. 1948), *second appeal*, 183 F.2d 467 (3rd Cir. 1950).

[93]See Turner, *The Recent Trend in Liability of Manufacturers*, 18 INS. COUNSEL J. 44 (1951).

[94]120 Utah 474, 235 P.2d 525, 26 A.L.R.2d 958 (1951).

[95]Annot., 26 A.L.R.2d 963 (1952) contains an extensive analysis of the cases involving allergies.

[96]Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48, 48 L.R.A. (n.s.) 224 (1913); Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 4 A.2d 73 (1939).

facturer and dealer will be expanded where there is any substantial question that even a small group of customers will be susceptible to injury.

Res Ipsa Loquitur

The liability of a manufacturer or dealer for damages caused by a defective article may, in many cases, depend upon application of the doctrine of res ipsa loquitur. Such potential liability must play an important part in determining the character and amount of public liability and products liability-completed operations insurance. In *Ryan v. Zweck-Wollenberg Co.*,[97] the Wisconsin court held that the res ipsa loquitur doctrine permits of an inference of negligence, not a presumption, and that therefore, even though the defendant introduces evidence to negative any charge of negligence, the jury may nevertheless base a verdict of negligence on the inference. The court followed the doctrine of the bursting bottle cases.[98]

The res ipsa loquitur doctrine as applied in the Ryan case makes it practically impossible in many cases for the defendant to avoid liability, even in the absence of demonstrable negligence.

The tendency of the Wisconsin Supreme Court has been to extend the doctrine as illustrated by an unbroken chain of recent automobile cases.[99] The subject of res ipsa loquitur in Wisconsin has been brilliantly treated by Professor James D. Ghiardi in two recent articles.[100]

Conclusion

In the present atomic era, we are astounded at the complications which our abundant life has produced. From it, there have been emerging new conditions out of which a myriad of claims arise. The proper presentation and defense of such claims requires a knowledge medium of chemistry, electronics, and involved engineering and processing which was unheard of in the earlier days of simple living. Poisonous fumes, smog, dust pollution, noise, inflammable or poison fabrics, mechanical and electric gadgets give rise to claims undreamed of a few years ago. Furthermore, one accident or occurrence may create not one claim but hundreds.

The lesson which every manufacturer and dealer must learn is that he cannot compete with his business rival and he cannot hope to remain long in business unless he has an insurance program which will take care of not only the ordinary but the extraordinary hazards as well. To plan and carry out such a program will require expert legal assistance by counsel who are familiar with the various coverages available. To a lesser extent, a similar obligation will devolve upon counsel who represent the claimants. To assist such counsel in their daily tasks has been our objective.

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[97]266 Wis. 630, 64 N.W.2d 226 (1954).

[98]See Johnson v. Coca Cola Bottling Co. of Willmar, 235 Minn. 471, 51 N.W.2d 573 (1952).

[99]Wisconsin Telephone Co. v. Matson, 256 Wis. 304, 41 N.W.2d 268 (1950); Schimke v. Mutual Automobile Ins. Co., 266 Wis. 517, 64 N.W.2d 195 (1954); Modl v. National Farmers Union Prop. & Cas. Co., 272 Wis. 650, 76 N.W.2d 599 (1956); Wood v. Indemnity Ins. Co., 273 Wis. 93, 76 N.W.2d 610 (1956).

[100]Ghiardi, *Res Ipsa Loquitur in Wisconsin*, 39 MARQ. L. REV. 361 (1956); Ghiardi, *Manufacturer's Control as an Element of Res Ipsa Loquitur*, 1954 INS. L.J. 616. See also Night, *Let the Bottler Beware*, 21 INS. COUNSEL J. 72 (1954).

OF LAW AND MEDICINE

Medicolegal subjects, the doctor-lawyer relationship, medical evidence, expert medical testimony, medical malpractice and its trends, and similar topics, will be presented in this department. The Journal will be pleased to have its readers submit articles of this type, either written by them or which may come to their attention.

The Subjective Complaint and the Medical Examination

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"MALINGERING" has been attacked as a medical term of diagnosis, and the complete abolition of the term has been recommended by a New York psychiatrist writing in the A. M. A. Archives of Neurology and Psychiatry[1]. Dr. Szasz contends that the term "malingering" carries a "moral overtone", and that the diagnosis should be a clear description and explanation of behavior, not its praise or condemnation. He decries the physician passing moral judgment upon the patient by condemning him with a term that implies the acceptance by the physician of a social point of view which condemns the practice. Dr. Szasz quotes another writer[2] to the effect that malingering is always the sign of a disease often more severe than a neurotic disorder, because it concerns an arrest of development at an early phase. Dr. Szasz refers to the modern "progressive" view that criminality is an "illness" and that this view is especially meritorious because of its "humaneness". He also states that in daily life malengering is rarely an issue except in military service, criminal law and "sometimes . . . in cases involving litigations with insurance companies over alleged damages to the patient's health". The writer's remarks are not confined to the field of psychiatry and presumably apply to the field of medicine generally.

Since the adoption of that writer's proposal would have an important bearing upon the legal profession and the courts, it appears proper to consider it further. If *fraud* is to be *condoned* as an *illness* while the physician withdraws into a professional vacuum wherefrom he can "see no evil, hear no evil, speak no evil" and wherein it is wrong for him to condemn malingering because he has thus aligned himself with a "social group" which frowns upon cheating, medical opinions will lose much of their practical value insofar as personal injury claims are concerned. Such abstract reasoning and theorizing will lead nowhere.

Despite Dr. Szasz' attempt to erase the opprobrious term (not to be confused with psychoneurosis[3]), malingering is an actuality.

It does not require a medical degree to prescribe the best antidote for malingering; certainty of detection and exposure

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[1]Thomas S. Szasz, Malingering: "Diagnosis" or Social Condemnation, Vol. 76, No. 4 (October 1956), A.M.A. Archives of Neurology and Psychiatry.

[2]K. R. Eissler, Malingering, in Psychoanalysis and Culture.

[3]Moses Keschner, "Simulation of Nervous and Mental Disease", Vol. 103, Journal of Nervous and Mental Diseases, p. 571 (June, 1946):
Some physicians, lawyers and insurance adjusters have a wholly unjustifiable tendency to confuse simulation with psychoneurosis. They are two distinct and entirely different clinical entities. A psychoneurosis is an actual illness in which unconsciously developed symptoms of physical or mental disease offer to the patient a possibility of solving his inner conflicts and fear of loss of security. Both the reason for the symptoms and their development are not consciously understood by the patient. A psychoneurotic tells the truth or what he believes to be true; he honestly believes that he is afflicted with the condition to which he attributes his alleged disability. A malingerer practices deception consiously with the prospect of pecuniary gain or of deriving some other advantage."

of the fraud will effect a sure cure while deterring others.

To point out the frailties of the argument and illustrate the difficulties of detecting and handling claims by malingerers, we should first look at the breadth of the field. Generally, there are four varieties of malingering:

(1) Exaggeration. — Genuine symptoms are present, but the patient fraudulently makes these out to be worse than they are.

(2) Perseveration. — Genuine symptoms were formerly present, have ceased, but are fraudulently alleged to continue.

(3) Transference. — Genuine symptoms are fraudulently attributed to some cause which would entitle the patient to benefit, although he knows that in fact they are due to some other cause.

(4) Invention. — The patient has no symptoms, but fraudulently represents that he has.[4]

The subjective complaint is the commonest medium by which the faker tries to deceive others. However, the subjective complaint is an invaluable aid in diagnosis; but before the examiner can safely predicate a diagnosis which is dependent upon a subjective complaint, he must assume the truthfulness of the complaint. Therefore, if the physician adheres to the old saw that, "I always believe what my patient tells me", he is passing "moral judgment" upon his patient in that he judges that the patient is telling the truth. When a physician testifies in court as to his *professional opinion* regarding disability based only upon subjective complaints, he is bound to pass moral judgment upon the credibility of the patient because his professional opinion must reflect his honest *personal* judgment of the case. How can a physician hold one *professional* opinion and *personally* hold another? When the test of judicial decision is sought to confirm or disprove a claim of personal injury, the subjective complaints of the plaintiff to his own phyisicians and the medical examiner play an important role. The courts recognize that such complaints may form the basis for mistaken medical diagnosis. Therefore, refined judicial distinctions apply to the admissibility and effect of the subjective complaints.

It is not within the scope of this paper to present a brief upon evidenciary matters. Several excellent annotations are readily available.[5]

In general, the plaintiff's physician on the stand may narrate the history given to him by the patient and express an opinion as to the nature and extent of disability based thereon, at least in part. This is upon the theory that the patient honestly seeking medical diagnosis and treatment will probably reveal the truth to his own physician. However, the patient's history given to his physician should not be accepted as substantive proof of the facts related.[6]

But where the patient procures an examination to qualify the examining physician as a witness and not for purposes of treatment, the physician is not permitted to state what the patient told him.[7]

Hospital records which are kept in the ordinary course of business are generally admissible insofar as they record the statements of the patient and factual observations of the attendants.[8] However, the verbal statement of the plaintiff contained in a hospital record as to how the accident happened is inadmissible.[9] Likewise, the plaintiff's statement to the attending physician as to the causes and circumstances of injury are not admissible unless made so soon after the accident and under such circumstances as to be part of the res gestae.[10] Reports to the employer by doctors engaged by the employer to examine or treat the claimant are admissible in federal court when offered by the claimant, under the Federal Business Records Act.[11]

An awareness of these rules allows scheming claimants to defeat them. A claimant may be sent to a conniving or simply naive physician who prescribes some unimportant medicine, physiotherapy, or an unneeded brace to create an ostensible physician-patient relationship in order that the physician may later appear in court and render an opinion based upon the subjective complaints of the patient. We know that these subjective complaints are

[4]Donald C. Norris, "Malingering", Vol. 150, p. 363 (June 1943) "Practitioner."

[5]67 A.L.R. 10, 80 A.L.R. 1527, 130 A.L.R. 977. Also see cases under Key No. 128 "Evidence", American Digest System.

[6]*DeLong v. Iowa State Highway Commission*, 1940, 229 Iowa 700, 295 N.W. 91..

[7]*Pierce v. Heusinkveld*, 1944, 234 Iowa 1348, 14 N.W. 2d 275; *State v. Beckwith*, 1952, 243 Iowa 841, 53 N.W. 2d 867.

[8]44 A.L.R. 2d 553.

[9]*Brown v. St. Paul City Railway Co.*, 1954, —— Minn.——, 62 N.W. 2d 688, 44 A.L.R. 2d 553.

[10]*London Guarantee & Accident Co. v. Woelfle*, (1936) 83 F. 2d 325.

[11]*Korte v. N.Y., N.H., & H.R. Co.*, 1951, 191 F. 2d 86. 28 U.S.C.A. 1732.

sometimes suggested beforehand to the claimant to be in turn narrated to the physician who has been selected. Or the patient may be sent to a physician knowing that the physician will probably hospitalize the person for an examination and diagnosis based mainly upon subjective complaints. All of us who defend personal injury litigation must have encountered cases where the first medical attention to an undeserving claimaint was procured upon the initiative and suggestion of his lawyer. With present day medical and hospital coverages, substantial personal expense is incurred in but few cases. Fortunately, but a few members of the honored medical profession and but a few members of the legal profession employ such tactics.

We sometimes read petitions or complaints for damages and before reaching the signature line are able to identify the lawyer or firm drafting the papers by the characteristic allegations habitually employed. Some lawyers rarely file a complaint for damages arising from accident without claiming a "back injury"; every rear-end collision involves a "whip-lash"; every concussion, however slight, involves physical injury to the brain and "change of personality" evidenced by the fact that the plaintiff "does not act the same as before". Coincidentally, these complaints are the most difficult to disaprove by objective signs. With some it has become a common practice to present a "psychiatric evaluation" of the effect of trauma (e.g. a hairline fracture) upon the claimant's personality.

The role of the subjective complaint in this area assumes tremendous importance. People do have headaches, backaches, aggravations of arthritis and miscellaneous pains. But the impropriety of permitting wholesale medical opinions based upon nothing more the self-serving complaints of the plaintiff is readily apparent. Here the physician, in order to preserve his own reputation and integrity, must pass "moral judgment" upon his patient.

The physician, as well as the lawyer, should have strength and character enough to condemn malingering without being deterred by a feeling that by exposing the same he is aligning himself with a social view which condemns fraud.

The medical examiner chosen by the defendant to make a critical examination of the plaintiff may approach the examination from a point of view different from that of the attending physician. His function is to *test* the veracity of the subjective complaints of the claimant and determine whether there are objective findings to support the complaints. Of course, they may be valid subjective complaints which cannot be proved or disproved by a physical examination. But wherever the complaint to be valid must be accompanied by a corroborative objective symptom which is not present, the examiner is entitled to disregard the subjective complaint.

The examining physician must be careful to distinguish his functions as an examiner and his functions when called upon to treat a person. Recently, the writer arranged to have an ophthalmologist examine a claimant who alleged that her declining eyesight was the result of an automobile accident. When we received the examiner's report we were amazed to find that he had undertaken to treat the plaintiff and had also prescribed corrective lenses for her glasses. The good doctor innocently defended himself with the statement that, "She needed treatment so I gave it to her." Thereby he had created a physician-patient relationship which placed his testimony beyond our reach, although we had employed his services in the first instance.

The medical examiner employed by the defendant should be thorough in his work. He should conduct his examination impartially with neither minimization nor exaggeration of the disability. In this connection he should take a detailed history of the patient in all cases which will include family and social history, other accidents and illnesses, as well as the history involving the occurrence of the injury. However, the claimant should not be allowed to inject into the reported history, those matters which bear upon the question of liability and have no relationship to the physical examination. Thus, the examiner should not say in his report that the patient said that "another car came through a stop sign without stopping" and struck the car in which she was riding, nor that she slipped on a banana peel "dropped by an employee". Ordinarily, the history taken from the patient should be designated as such and set out in the first part of the written report.

The second part of the report should cover the examination and actual findings. Many examinations are too brief and confined to the parts alleged to have been in-

jured. The thorough medical examiner will examine the eyes, throat, lungs, heart, blood, urine and blood pressure as a matter of routine, for these matters may have an important bearing upon the life expectancy of the injured person independent of the specific injury involved. The findings should be specifically recorded and reported. If x-ray films are taken and have been interpreted by a radiologist upon whose opinion the examiner relies, the X-ray report should be set out verbatim.

The final and most important part of the examiner's report should be a statement of his conclusions. There appears to be a growing tendency on the part of physicians to rate every personal injury on a workmen's compensation basis. If the case involves a workmen' compensation claim, obviously, the examiner should rate the disability in proper percentages of the affected parts. But these percentages are at best a rough attempt to fix an arbitrary statutory standard of damages in a particular class of cases and are not the standards by which courts submit personal injury negligence cases to juries. Workmen's compensation cases are percentaged according to the degree of "industrial" disability, which is not the yardstick for recovery in tort actions.

Many examiners, in the statement of their conclusions, erroneously assume that they are bound to adopt the subjective complaints of the patient. Thus, an examiner is not obliged to render an opinion that an arthritic condition was "aggravated" by an injury unless there is something other than the subjective complaint of the patient upon which to base this conclusion.

Another common error on the part of the examiner is his statement as a conclusion that the disability found in the patient was the result of the particular accident described by the plaintiff. All of us have seen cases in which the plaintiff concealed the fact that he actually had an old injury or a sub-sequent non-compensable injury and falsely attributed his disability to the accident in litigation. An interesting example of this occurred in a case tried by the writer. The plaintiff was actually injured in an automobile accident in Des Moines. Through an anonymous telephone call during the trial of the case we learned that the plaintiff had also claimed to have sustained *the same injury* while employed in Nebraska *at a later date* for which she filed workmen's compensation claim and had been awarded permanent total disability while our case was pending. In the workmken's compensation proceeding in Nebraska, the claimant had testified that she had never been involved in an accident before. Upon confrontation of the plaintiff with a transcript of her testimony in the workmen's compensation case, her claim dissolved in her own perjury.

In stating his conclusions, the examiner should use his own independent judgment. The defendant employes the examiner to procure *his* opinion. It is not proper, even in the camaraderie of the medical profession for the examiner to call up the attending physician and obtain his views. Similarly, the defense should not attempt to influence the examiner by an expression of opinion regarding plaintiff's condition. However, it is proper for a letter to be sent to the examiner setting forth the allegations relating to injuries found in the complaint itself or the testimony of the plaintiff on discovery deposition as to the nature of the injuries.

It should be remembered that medical reports and copies of medical reports are often introduced in evidence for various purposes. Consequently, the claimant should not be permitted to inject the reported history references to settlement negotiations with the "insurance company" which may be involved. This is not part of the pertinent medical history.

The examiner should not orally state his conclusions to the claimant. These may be erroneously narrated in court at a later date by the claimant to impeach the physician's testimony.

Wherever possible, the report should be addressed impartially to counsel representing the defendant rather than to the insurance carrier involved.

Where the diagnosis is wholly or in part dependent upon subjective complaints of the patient, there is nothing to prevent the physician from rendering more than one opinion in his conclusions. Thus, one opinion may be based upon subjective symptoms plus objective findings and an alternative opinion may be rendered based upon the objective findings alone. This removes responsibility from the physician for either accepting or rejecting the subjective complaints of the claimant.

Physicians have a natural reluctance to brand anyone as a liar and a cheat. It is

not necessary that the physician do so. If the complaints of the patient are not substantiated, a simple statement that the physician finds no objective evidence to support the complaints made is sufficient.

Claims examiners and lawyers are usually not physicians and the report should be written in such terms as will convey as clear a picture of the disability as is possible to lawyer, claims examiner, court and jury.

It is essential that the physicians chosen by insurance companies represent the most competent and impartial members of the medical profession. The eminence and integrity of the examiner lends its own weight to his report and his testimony in court.

Hundreds of millions of dollars are disbursed each year upon the strength of written medical reports. Careful attention should therefore be given to their form, completeness, and the conclusions regarding diagnosis and prognosis.

THIRTY-FIRST ANNUAL CONVENTION

THE GREENBRIER

WHITE SULPHUR SPRINGS, WEST VIRGINIA

JULY 9, 10, 11 AND 12, 1958

Traumatic Neuroses*

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THE SUBEJCT of the traumatic neuroses is, at best, a nebulous and somewhat controversial subject. Accordingly, it would be prudent to consult the standard literature to ascertain what concepts of the traumatic neuroses might have been made available to the internist, the orthopedist and the general practitioner, as well as to the attorneys. I regret to say that this study does not clarify the subject as much as we might hope. Six standard texts were selected at random by me, to avoid possible biased selections of information from one or another psychiatric theory, only.

In Dr. John D. Campbell's book, entitled, "Everyday Psychiatry", the following is found, and I quote:

> "By posttraumatic psychoneurosis, in this discussion, is meant the neurosis following injury to the head and not the psychogenic reaction to injuries to other parts of the body. The psychoneurosis which occurs as a result of disfiguring burns, the loss of a limb, or frightening experience such as a railroad accident, should be classified, in my opinion, under 'anxiety neurosis' or 'reactive depression' depending on the form of the neurosis. The terms, 'traumatic experience and phychic trauma' should not be confused with posttraumatic psychoneurosis, which is a distinct type of neurosis, due to head injury. Schilder's definition, 'A traumatic neurosis is one which follows an injury to the body,' is NOT accepted in this discussion. The posttraumatic psychoneurosis described here is similar to the postconcussion syndrome of Strauss and Savitsky, characterized by headaches, dizziness, fatigue, irritability and vasomotor changes."

The author then makes his point more plain when he writes that the stresses are the same but the individual's constitutional make-up is changed. The basic factors of personality inherent in the structure of the central nervous system are so changed in their various proportions that the patient becomes unable to adjust on the same level as previously. Mental alertness, a sense of responsibility, emotional stability and sexual desire are the factors which suffer and when they change they precipitate the condition known as "psychoneurosis." There is graphic evidence that the essence of psychoneurosis is in the central nervous system.

Factors which probably play a part are severity of damage, brain tissue destruction, etc. The author is, obviously, referring to actual brain damage or to what, in more recent nomenclature, would be referred to as a brain syndrome, acute or chronic.

In the book entitled, "Introduction to Psychiatry," by English and Finch, we find the following: "Emotional instability, difficulty in maintaining previous work adjustments, loss of ability to discriminate fine meanings, chronic headaches, irritability, vasomotor instability, intolerance of light and of noise in general, plus a general tendency to impulsivity," are all discussed under the heading of "chronic brain syndrome, associated with brain trauma." Elsewhere in the book there is a discussion of the neuroses, but in this discussion there is no reference to traumatic neuroses, as such.

In Muncie's well-known textbook, "Psychobiology and Psychiatry," there is a rather illuminating reference to what the author chooses to call "a compensation neurosis." This is described as an heterogenous group of reactions, with hypochondriacal, hysterical, neurasthenic, anxiety and general nervous symptoms, having in common only their relation to an accident or injury for which disability is claimed and compensation claimed.

In the "Handbook of Psychiatry," by Overholser and Richmond, there is the following statement: "Most of the shell-shocked cases were not injured, physically, and yet they were blind or deaf, unable to speak or to move and they recovered without physical treatment, under the various forms of psychotherapy."

In Cavanaugh and McGoldrick's "Text-

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book of Fundamental Psychiatry" the following statements appear: "Post-traumatic psychoneuroses—this term refers to the psychological and emotional disturbances that sometimes are associated with minor head injuries. These reactions are rather emotional than organically pathological. They are to be distinguished from the psychoneuroses resulting from severe emotional upsets accompanying extensive injury or terrifying experience."

Dr. Walter Alvarez, in his textbook, "The Neuroses," describes headaches, backaches, aching in the limbs, failure of memory, inability to concentrate, a tendency to introspection and brooding, fears and phobias, changes in temper, rapid heart rate, vasomotor disturbances and distburbances of indigestion, as the symptoms of traumatic neuroses.

One last reference which I would like to make is one for which I must apologize, inasmuch as I cannot find the source: at the American Psychiatric Association Convention in St. Louis, several years ago, a psychiatrist from the School of Medicine, Tulane, discussed phobias, or phobia-like conditions, which began abruptly with traumatic conditions and cleared up with insight into the nature of the trauma.

I will conclude from all of this that there is no general agreement as to the meaning of certain terms in common use which are similar to each other, if not frankly identical. For the purpose of this discussion, I propose that we limit the term in meaning to the following: a traumatic neurosis is one which begins abruptly in a person subjected to trauma of one kind or another, who had not been symptomatic prior to the time of the trauma and in whom there is no organic brain change.

Dr. Malamaud has classified the neuroses into three large groups:

(1) Hysteria, which would include those conditions in which there is a production of symptoms without apparent organic lesion, where there is a disability in excess of the deformity or where the disability outlasts the deformity.
(2) Anankastic reactions, which are characterized by involuntariness – involuntary fears, thoughts or acts.
(3) Faulty control of emergency reactions, including excessive anxieties, depressions, etc.

Dr. Alvarez has described symptoms of the third group: the psychiatrist from Tulane described "Anankastic" reactions, and I believe that all of us have seen hysteria, or hysteria-like conditions.

It is my opinion that any of these symptoms can, under certain circumstances, be precipitated by trauma but they are not formally related to trauma. In varying degrees they are related to the past life of the patient and all presuppose some type of psychological mechanism.

The symptomatology may only take the form of tension in a person who was not previously tense, or a phobia in a person not previously phobic—or it may take the form of a physical symptom. The physical symptom, in itself, may be of several different kinds—it may take the form of a disability, for which there is no apparent structural or anatomical change. It may take the form of an exaggerated dysfunction which is not completely explained by the existing deformity. It may take the form of a prolonged invalidism which long outlasts the actual injury.

Many years ago Sigmund Freud, himself, differentiated between neurotic reactions which originated in the traumatic events of childhood, to which he applied the term "psychoneurosis," and those neurotic reactions which were more closely related to the events of the "here and now." Of course, Dr. Freud was impressed by the importance of sexual traumata in these cases, but this is a matter into which I do not intend to delve at this particular time. I am simply concerned with establishing an historical precedent for the division of the neuroses into these two types.

Some may immediately raise the question as to how these two reactions are related to the type of reaction which we call hysteria, a type of reaction, incidentally, which is also characterized by the production of symptoms in the apparent absence of an organic lesion. In my own thinking, the chief point of distinction lies once again with the theories of Sigmund Freud. According to Dr. Freud, the hysterical symptom always has a symbolic significance. If one understands the symbolism one can see a certain significance in the symptom, a significance which, incidentally, is not to be guessed in the absence of that understanding. In the case of the traumatic neurosis the symbolism is by no means so apparent; rather the symptom seems to be accidental in the sense that the trauma determines the symptom, rather than than the symbolism of the patient's thinking de-

termining the symptom.

Now this is, of course, a relative matter and it is probably not accurate to say that hysterical symptoms are never in any way related to accidental matters, nor is it accurate to say that traumatic symptoms are never in any way related to symbolism. For example, it has been pointed out on many occasions that people frequently suffer from disabilities related to back injuries. The most accurate neurological examinations and orthopedic examinations may not disclose sufficient damage to account for this complaint. It would not be accurate, however, to say that the back complaint had nothing to do with the fact that the person was previously struck across the back and knocked down. On the other hand, it is probably not accurate to say that the complaint is completely unrelated to the fact that people of a particular psychological type, usually one of severe dependence, are notoriously vulnerable to back complaints. Possibly, then we are on safe ground when we admit that both factors may be significant.

To explain how the symptoms come about, I will rely for a moment on two words which are not essentially medical in derivation. The philosophers use the word "occasion" to describe those factors which account for an act occurring here and now, as opposed to some other place at some other time, and they use the word—"condition" to describe those factors without which this act could not have come about at all. Psychologically speaking, I would relate the occasion with some accident or some traumatic situation into which the patient is thrust and from which he cannot extricate himself. This may take the form of an actual accident on the street or in a plant, or it may take the form of an incident in military life. Obviously, not all people who are involved in accidents are severely disabled, not all people in military service are disabled by exposure to incidents. The difficulty here lies in the fact that we become so fascinated with the details of the "occasion" that we neglect a serious and detailed consideration of the "condition."

Since the occasion is practically never neglected, I shall not spend much time in considering it now. I should, however, emphasize that it is essential that one consider the length of exposure to the traumatic event. For example, it is one thing to have, let us say, a near accident in an automobile, and it is quite another thing to have a near accident in a military aircraft after months of dangerous and fatiguing duty. It would require very much time to discuss the results of distress—more than enough time for another paper, but I believe it should be emphasized that there are certain changes of a biochemical nature which occur in people who have been exposed to stress of a long period of time. These people are different, (physiologically,) and I doubt that any amount of psychotherapy will, by itself, change the physiological functioning of their bodies. Part of this physiological change is what I believe Dr. Alvarez refers to when he describes the change in heart rate, the possible change in blood pressure, the change in digestion, etc. There are even measurable changes in muscle tension.

In any discussion of the traumatic neuroses it would not be accurate to fail to mention some of the difficulties involved in the diagnosis. We are all, more or less, alerted to the fact that occasionally a case of multiplesclerosis will be encountered and cause difficulties. Occasionally, a dislocated nucelus polposus will cause some diagnostic problems. In these cases I can simply refer you to the physical examination and the usual supplementary procedures.

There is, however, one condition that I believe should be given special mention and that is the possibility of a post-concussion syndrome. Subsequent to head injury, there may be certain vague personality changes that are extremely difficult, sometimes, to evaluate. I point them out for special attention because they are not as directly related to the usual personality development as one might think. Rather they are related to a diffuse cortical damage which results from, at least, a temporarily increased intracranial pressure and multiple petechial hemorrhage.

We have learned to expect certain personality changes in early paresis, early senile dementia, or early cerebral aterio-sclerosis, but we may well overlook the fact that similar anatomical damage can take place after trauma, and that this is a very easy type of damage to overlook if the history of trauma is not dramatic.

In the presence of a history of even mild injury, I would earnestly advise a routine electroencephalogram and certain tests for organicity, such as the Bender test for organicity and the various simple tests for

aphasia. The Rorschach test is also frequently used for this purpose, although it is probably not quite as specific as one would like. In one clinical investigation that I know of, the Rorschach test was found to be more valuable than any other single method of investigation. It should be emphasized that these tests will often help to make an anatomical diagnosis where other signs are not elicited. They will, however, not make an etiological diagnosis and they should not be expected to do so.

With this brief statement, let us pass to the matter of "condition." The matter of the condition cannot be considered without considering the so-called secondary gain. This is a factor in the analysis of hysteria, also, and the term refers, simply, to the fact that a person in a devious or perverse way "gets something" out of being ill or disabled. Sometimes the gain is so small, and the disability so very great, that the examiner may be incredulous that it could be considered at all. I can only point out, in this respect, that when we refer to man as a rational animal we are referring to him as a beast. He does not always, in all of his behavior, justify that description. We are not trying to gingerly describe a malinger. The nearest thing that I can think of by way of analogy would be this: —suppose that we postulate a young man who is told, as a small boy, that he has a heart murmur and that, as result, he should "take it easy and avoid excessive exercise." Let us say that he follows the regime for ten or twelve years, then suddenly he is called, at the age of twenty, for military examination and is told, to his surprise, that he has no heart murmur, he has no heart disease, and that the electrocardiogram discloses no evidence, whatsoever, of cardiac pathology. Rationally, one would expect that this young man would literally leap for joy; in actual practice, however, these people are quite loathe to accept this reassurance and frequently they continue to be disabled. They have learned, too well, to look upon themselves as invalids. There are some among us who are potential invalids because we have learned too well some lesson that predisposes us to accept invalidism. The secondary gain, then, may take the form of a reason for doing something to which the patient has always felt impelled.

One might summarize this particular view of things by saying frequently the patient has a somewhat different concept of himself than the concept which other people have of him.

To understand the exact dynamics of the production of the symptoms I refer you briefly to the experiments of Pavlov, the Russian physiologist, who worked with condition experiments with animals. Dr. Pavlov, if I may very briefly summarize his work, pointed out that an animal and, incidentally, a human being may learn to perform some act which is understandable in the light of some particular stimulus. For example, presented with warm food it is a normal response for the animal to salivate. If a neutral or unrelated stimulus is supplied simultaneously with a significant one, it becomes apparent, after a while, that the neutral stimulus, by itself, will elicit the same response as the significant one did originally. This is sometimes referred to by psychologists as sensory learning. It is my opinion that many anxiety reactions and many tensional states and even near phobias are explained on this basis—the fear, the tension, or what-have-you, was understandable in the light of the original situation, which acted as the significant stimulus, but an uncritical form of sensory learning has taken place and the resultant "spread" has resulted in more and more neutral stimuli becoming effective, in that they now can touch off the original fear reaction.

In the same way a physical disability, which was quite understandable in the light of an original injury, may be perpetuated indefinitely by a series of apparently neutral stimuli, the existence of which is not even guessed at by the patient or the doctor. This type of explanation, of course, implies that the symptoms are related to the occasion and to the condition, also. Without the latter we would not have a complete understanding.

Now, of course, it is easy enough to stand aside and describe, theoretically, what happens, but the practical question is, what can be done about it? How can we judge the importance of the condition after the accident occurs? We must realize that once a military career, or lack of it, is at stake, or when, perhaps, a lawsuit is impending, we are not likely to secure objective answers to our leading questions. We all, I presume, ask such leading questions as, "How much time has the patient lost from school because of illness?" "How many unexplained illnesses did the patient

have in the past, and did the patient have any nervous breakdowns in the past?" These questions are designed to give us some insight into what sort of a person the patient was prior to the time of the accident. I suspect sometimes the patient is not quite so naive as we seem to think. Practically always, I find that the patient was, without doubt, the healthiest and the strongest person in town prior to the accident.

In order to proceed further, I refer again to Dr. Pavlov or, perhaps better, to some of his critics. As one experimentalist pointed out, if someone sneaks in prior to the experiment and feeds the dog, the resultant salivation does not occur when food is presented. This, of course, means that the condition of the dog or, in our case, the condition of the patient prior to the time of the accident, is also important. There are, I believe, certain psychological tests that give indications of attitudes and even of anxiety unrelated to the immediate incidents. For example, by use of the Rorschach test a rough estimate can be made as to the general uncertainty and insecurity of the person, a condition which is not altered by accidents nor even by such drastic treatments as electric or insulin shock. Attitudes are indicated by such tests as the thermatic Apperception test and the Minnesota Multiphasic test.

I do not propose to go into the details of these tests, but rather to indicate that there are certain rough measures which can be utilized. These tests give information from which certain conclusions can be inferred. I do not mean to intimate, of course, that an anxious person could not also have a ruptured nucleus polposus, nor that an insecure person could not also have a brain concussion. I merely mean that, in the absence of other positive findings, these results may be suggestive, even though I do not believe that they are in themselves conclusive.

In the way of treatment I would suggest the following:

First—an immediate settlement of the case from a financial standpoint, just as soon as possible.

Second—I would oppose any type of any financial pension arrangement, since this will almost certainly propose a secondary gain for the indefinite continuation of the symptoms.

Third—I would suggest that the physician who eventually treats the person be someone quite distinct from the physician who evaluated the patient for the purpose of the settlement.

I would suggest that the actual symptom be attacked as directly as possible and as soon as possible. This may be done by hypnosis or by sodium pentothal abreaction. The attitudes which help to make up the necessary condition for the original production of the symptoms should be handled by counseling and psychotherapy. In some instances this can be done effectively by the general practitioner. In general, the patient should be urged to permit as little capitalization on his disability as possible. Obviously, this maneuver in itself requires considerable tact and diplomacy on the part of the physician.

All of this is, obviously, a formulation according to the concepts of anthropological medicine and, as such, these concepts are not limited to neurology nor to psychiatry, but probably approximate fairly closely the original and perhaps some of our old-fashioned concepts of general medicine, in the fullest and in my opinion the best meaning of the word.

The Use of Disinterested Medical Testimony*

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I SPEAK today as a surgeon who for many years has been called upon to give expert testimony in an ever increasing number of personal injury cases. Despite my exposure to the fine faculty at the University of Virginia Law School, I consider myself competent at this moment to speak only from the vantage of a physician and surgeon.

There are a number of existing conditions, which continue to act as obstacles to justice in personal injury litigation.

The court calendars are over-crowded with this type of case. In certain large cities, three or four years may elapse before trial. The bottle neck is only in personal injury cases. Cases in contract, equity and all other types are tried promptly. Settlements are not made on a large enough scale to keep up with the increasing load of litigation.

The parties are unable to agree on a figure for settlement because of inability to agree upon the nature of the injuries suffered by the plaintiff. So long as partisan medical testimony is the only basis for arriving at the medical facts, there will continue the intrusion of too many uncertain human variables; the honesty, the integrity and the real ability of the expert as distinguished from his personality and the intelligence and knowledge possessed by judges and juries. Fortunately, the number of cases in which the medical claims are irreconciliable are few but the drain of this small hard core on court time is out of all proportion to its size. There is a direct relationship in the "Battle of Experts" to congestion. Any improvement in the fact finding process cannot but help to contribute constructively to the problem.

Medicine is not an exact science and honest differences of opinions are normal. Expert opinions do not always diverge to the extent of one hundred percent. But opinions expressing differences as great as between thirty and seventy percent, fifteen percent and eighty-five percent, or "substantial" and "minimal" are heard every day. A typical question that is frequently asked is "Doctor, as expert for the plaintiff, in what degree, in your opinion, is the plaintiff disabled"? Answer, "He is totally and permanently disabled". Dr. B. as expert for the defendant is then asked "Doctor, to what degree, in your opinion, is the plaintiff disabled"? Answer, "He is not disabled at all. He could work if he wanted to. He is a malingerer and a loafer". Every doctor, like every lawyer, has an inherent or emotional bias which predisposes him in favor of one side or another. Not all doctors are equally competent or learned, nor are doctors equally impartial. A few are venial, some are openly corrupt. Others, when cast in the role or partisans, subjected to hostile cross examination and paid by one side, sometimes on a contingency basis, consciously or unconsciously color their testimony.

Despite their varying degrees of skill, impartiality and honesty, all licensed physicians, under the law are competent to testify as experts. The onerous burden of deciding which doctors are worthy of belief is placed on judge and jury, neither of whom are often equipped to measure medical skill or verify medical facts. Often the decision to believe one doctor over another is predicated upon nothing more than courteous manner, bubbling personality or histrionic ability. The spectacle of an ignorant or corrupt doctor who appears to be more impressive on the stand than the learned and upright physician has distressed many good doctors. They will not hire themselves out as partisans nor do they wish to create an inference of partisanship.

The medical profession recognizes through boards of specialists, appointments to medical college faculties, and in many other ways varying degrees of skill among its members. The leaders in every field of medicine will make themselves available to the courts in the interest of justice but they must first be convinced that they are not being called upon to advance what is often an unjustified mercenary interest by both lawyer and patient.

Both the legal and medical professions are composed predominantly of honorable devoted men and women. The many are

*Delivered before the 1957 Judicial Conference of Virginia, at Roanoke.

stigmatized by a small fringe of unscrupulous practitioners and by a larger group who have become careless and have failed to conform to the highest ideals of their professions. Now, as never before, interprofessional cooperation is needed to meet this joint responsibility.

It may be that here in Virginia, the problems arising from partisan testimony are nonexistent. My unpracticed observations lead me to believe differently. I have heard it stated, particularly by plaintiffs' attorneys that all Virignia doctors are upright, honest and cooperative. Indeed, the defendant's brief in *Virginia Linen Service v. Allen* alleges that some doctors are perhaps too cooperative. No physician should place himself in a position where an inference of unethical conduct may be inferred, however unjustifiable that inference may be.

The Model Expert Testimony Act was written with the problem of impartial testimony in view. The act would allow a judge, in any kind of case, to appoint an expert witness, not necessarily a doctor to report and testify. The appointment would be made only after hearing the parties as to the need and desirability of such a course of action. The expert would be chosen by the judge only if the parties could not agree. Compensation would be paid in equal parts by the opposing parties and charged as costs in the case.

Personal injury litigation has felt little or no impact from this proposal. Realistic implementation is lacking. No arrangements are made for interprofessional cooperation nor are panels of experts made available. Parties are often unable to bear the additional financial burden imposed.

Judge Coleman of Maryland evolved a plan in which he appointed experts to sit in on cases requiring the use of expert testimony. The court's experts were called upon to explain in language the jury could understand any ambiguities or variations in testimony that appeared. Such a plan merely grasps for a solution and comes no nearer to one than the Model Expert Testimony Act.

With the impetus given by the model act, the New York Academy of Medicine and the justices of the Supreme Court of New York under the leadership of Justice Peck cooperated in a project conceived earlier by the court, whereby the model act could be implemented. Two basic problems were the immediate goal (1) finding the impartial experts and making them readily available for appointments, (2) establishing a procedure for selecting cases in which the project might be helpful, and for using the reports rendered by impartial experts.

The problem of legal mechanics was solved by a "Special Rule" of the Appellate Division of the Supreme Court, First Department effective December 1, 1952. The New York plan is conducted by the arrangement of a pretrial conference in which the judge explores with the lawyers for both sides the issues in the case and the possibilities of settlement. He has before him the medical reports by the doctors for both sides, as well as the hospital records if the plaintiff has been hospitalized. If it appears that there is a sharp dispute as to the nature of the injuries suffered by the plaintiff and, if, in the judge's opinion, a report by an impartial expert would be helpful, he makes an order referring the case to such an expert. *Consent of the lawyers* is not necessary and to date no lawyer has registered any serious objection.

The judge knows only the groups of specialities that are available but does not know the names of the doctors. His order is directed to the clerk of court who makes the necessary arrangements and selects by rotation the name of an expert who has been made available by the cooperation of the Academy of Medicine and the Bar Association. The judge also fixes a date for a resumed pretrial conference when the case is again discussed in the light of the findings by the neutral expert.

Occasionally multiple examinations are necessary, especially where there are several plaintiffs or because the plaintiff's multiple injuries require the services of two or more experts.

The names of the neutral physicians on the various panels are kept confidential so that there will be no opportunity or temptation for the lawyers to seek the services of any particular doctor. After conference with the lawyers, the clerk ascertains when the examination can be scheduled. The lawyers are further notified that they must submit to the neutral expert all medical records in advance of the examination. In the event that hospital records have to be examined, the lawyer relying upon the hospital record prepares a subpoena duces tecum returnable at the doctor's office. This subpoena is approved by the clerk of the medical report office and "so ordered" by a justice of the supreme court.

When the patient appears at the scheduled time at the doctor's office, he recounts his ailments and his medical history. The doctor makes as complete an examination as he deems necessary; and finally makes his diagnosis and prognosis. No treatment is recommended but only an opinion to be embodied in a report and later to be expressed on the witness stand in the form of testimony, subject to cross examination. Neutral experts, no less than doctors employed by the parties are aware that litigation is in progress. They are forewarned against taking the patient's word as gospel. That they have been able to maintain a proper degree of skepticism is demonstrated by the fact that their findings have as often been against plaintiffs as in their favor.

Three copies of the doctor's report along with the doctor's bill are forwarded to the medical report office. On receipt of the reports, the clerk retains one copy for the use of the judge and sends the other two copies to the lawyers involved.

At or near the date fixed for a resumed conference the lawyers and judge again review the case. Settlement is discussd and effectuated if possible, but if these arrangements cannot be made then the cases are arranged to fit into a court of proper jurisdiction. If the parties consent, the case may be transferred to city court whose jurisdiction is limited to six thousand dollars as contrasted with the supreme court which enjoys unlimited jurisdiction.

If the case later goes to trial the impartial expert may be called to testify. He need not be called upon, however, unless one of the attorneys, or the trial judge, desires to examine him as a witness. A subpoena is not necessary. Direct communication between the impartial expert and either attorney is discouraged.

When the expert takes the stand, the attorney who requested his presence in court may qualify him as an expert and then proceed in the same manner as the examination of any other expert witness. He may be cross examined by the opposing attorney and questioned by the judge. The ordinary rules of evidence apply, with the possible exception of the one which forbids a party to impeach his own witness. Some judges assume that this rule applies, while others assume that both attorneys are free to examine the impartial expert fully without any fear of being "bound" by his answers in view of his special status. Sometimes a written report of the impartial expert is received in evidence by consent of both sides. (This rule is somewhat different from Rule 3-23-D of the Virginia Code which indicates that the written report shall not be admitted in evidence unless by the party who submitted to the examination.)

The successful use of the project is fully documented in a published report by the special committee of the Association of the Bar of the City of New York on the medical expert testimony project. I urge all of you who are interested, though skeptical, to read this report.

Justice Miles of the supreme bench of Baltimore delivered an address before the A.B.A. Section of Judicial Administration at Dallas, Texas in August, 1956, in which he outlined and compared the Baltimore plan for impartial testimony with the New York plan. The Baltimore plan differs in method; the cost of expert examination and testimony is borne by the litigants, whereas, under the New York system, the impartial medical expert is appointed by a system of rotation, operated impersonally, anonymously and without choice of judge or counsel. Under the Baltimore system the judge and counsel for both sides have an opportunity to discuss the available experts whose names are obtained from the medical society. In action, the New York plan has given very much better results.

In Philadelphia, the Board of Judges of the Courts of Common Pleas have urged that all counsel in personal injury cases, by stipulation designate an impartial medical expert to examine the plaintiff with an agreement on his fees and expenses. It has been further suggested that the pretrial conference judge or the trial judge be authorized either of his own knowledge or with the assistance of the president of the county medical society, to designate a well qualified and impartial medical expert, in such field of medical skill as may be called for by the circumstances of the case (and preferably one who does not appear regularly in court for either plaintiffs or defendants) to examine the plaintiff and send a report in triplicate to the judge. The expenses shall be borne in equal shares by the parties to the litigation.

A survey was made among physicians in New York and it was shown that they are enthusiastic about the system. There were a few difficulties in reference to the mechanics but it was felt that these could be

rectified in a more permanent system. Critical comment was evoked because of the court's refusal to allow any item from the history to be used as a contribution towards the diagnosis. Some courts demanded that diagnosis rest entirely upon objective physical findings. It should be decided whether or not the patient's history is to be a contributory part of the diagnosis and the examining physician should be told this before the patient is examined so that he may conduct his examination with this object in mind. Every physician knows that an accurate history is a very important aspect of diagnosis. To insist that the testimony of the expert be confined entirely to physical findings results in difficulty, since the expert may not examine the patient for several years after the accident at a time when there may be no findings. Psychiatric consultants have noted that the rapid settlement or trial has been responsible for limiting the development of functional overflow on top of whatever organic injuries may have been sustained.

If there be any need in Virginia for the institution of a form of impartial medical testimony project, some legislation would be necessary. Rule 3-23-D states, and I quote "if the pleadings raise an issue as to the mental or physical condition of a party, the court upon motion of an adverse party may order the party to submit to an examination by one or more physicians named in the order and employed by the moving party. A written report of the examination shall be made by the physicians to the court and filed with the clerk before the trial and a copy furnished to each party. The court may in the order fix the time and place for the examination and the time for furnishing the copies and filing the report." The Virginia Code, in my opinion, needs implementation before it can successfully approach the results secured under the New York plan. To the end of securing justice, I pledge my cooperation and I am certain that cooperation will be forthcoming from the Medical Society of Virginia as it has from organized medicine elsewhere.

"Res Ipsa loquitur"—Liability Without Fault*

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Introduction[1]

THROUGHOUT the United States and England medical malpractice lawsuits are alarmingly on the increase. So are the size of the verdicts rendered therein.

Newsweek Magazine reports:[2] "Some 5,000 cases are now being tried each year with thousands of other cases settled out of court. Since 1950, one out of every 35 doctors insured under the New York State Medical Society's group-insurance plan has been sued in the courts for malpractice."

The chairman of the District of Columbia Medical Society Professional Liability Insurance Committee (where recently 115 malpractice cases were pending and the doctors found all group insurance withdrawn from them) states:[3] "Only about one in seven or eight of the district cases shows any voluntary negligence on the doctor's part. Nonetheless, the doctor loses about one in four cases."

England's experience is the same:[4] "The flood of claims against doctors which has been steadily rising during the past few years, shows no sign of subsiding. In fact, in the year under review, the number of such claims has again shown an increase."

Verdicts are even more alarming. In a very recent case,[5] a San Francisco jury returned a malpractice verdict in the sum of $250,000. A few months before, a San Diego jury[6] returned a malpractice verdict in the sum of $210,000. A Tennessee jury[7] returned a malpractice verdict of $200,000, a federal jury[8] one of $123,000, a Texas jury[9] one over $100,000, and a Wisconsin jury one of $97,000.[10]

In fact, the medical malpractice picture is changing so catastrophically that one wonders if the law itself is changing:[11] "The increase in the number of actions against hospitals and doctors has given rise to the feeling in some quarters that the law of negligence, in so far as it affects doctors has undergone a drastic change."[12]

We submit, and earnestly hope, that it has not, and that our courts will continue to adhere to those safeguards of the law requiring legal proof of negligence by expert testimony in medical malpractice cases. The rationale of recent cases extending the doctrine of *res ipsa loquitur,* however, alarms us and commands our serious attention.

Theory of the Law

The basic theory of our law is that he who accuses must prove.[13] In medical malpractice cases this means *"must prove by expert medical testimony,"*[14] for the jury, which alone is empowered to determine all disputed questions of fact, can have no opinion upon complicated medical questions unless furnished that opinion by doctors themselves testifying in the case. Nothing is more fundamental to the law than

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[1]This introduction, with but slight modifications, was taken from a recent article by the same author entitled "Medical Malpractice—A Changing Picture" originally published in the January 1956 issue of The Insurance Counsel Journal a publication of the International Association of Insurance Counsel.

[2]Newsweek Magazine, July 11, 1955; see also Footnote 3.

[3]See 392 Ins. Law J. 614, Martin, W. F.: "Trial of Medical Malpractice Case."

[4]Report of Medical Protective Society, Ltd., September, 1954. See also Footnote 3.

[5]See infra, Footnote 62.

[6]See Footnote 3.

[7](Circuit Court for Shelby County, Memphis, Tenn. Judge Wilson, October 15, 1952) not officially reported. See articles in Memphis Commercial-Appeal October 16, 1952, Memphis Press-Scimitar October 17, 1952, Arkansas Gazette (Little Rock) October 17, 1952.

[8]217 F. 2d 70 (U.S.C.A., 9th, 11-19-54). For opinion below, see: 111 F. Supp. 162 (U.S. D.C. N.D. Calif. 3-11-53).

[9]258 S.W. 2d 182 (C. of A., 4—6-53), rehearing denied, 5-11-53.

[10](Circuit Court, Milwaukee, Wis., 3-18-54, unreported.) See: The Milwaukee Journal, 3-19-54.

[11]See Footnote 67.

[12]See Footnote 4.

[13]20 American Jurisprudence, 138 Evidence, Sec. 135, Burden of Proof.

[14]192 F. 2d 181 (U.S.C.A. 3rd Cir., 1951); 78 F. 442 (Cir. Ct., S.D. Ohio, W.D., 1897); 158 F. 2d 969 (U.S.C.A. 6th Cir., 1947); 88 N.E. 2d 76 (Ohio. 1949).

that a jury must not be permitted to speculate:[15] "Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has the right."[16]

Jury speculation in medical malpractice cases means that the jury must guess whether or not a physician's particular course of conduct constituted malpractice, that is, whether the defendant-doctor "in the performance of his service either did some particular thing or things that physicians and surgeons of ordinary skill, care, and diligence would not have done under the same or similar circumstances, or that the defendant failed or omitted to do some particular thing or things that physicians and surgeons of ordinary skill, care, and diligence would have done under the same or similar circumstances."[17] For manifestly, a lay jury of men and women, untrained in medicine, can have no opinion as to what "thing or things" a physician or surgeon of ordinary skill would or would not have done under similar circumstances save as a physician or surgeon tells the jury by testifying in open court. To prevent jury speculation with the rights of the medical profession, the law has always required that the patient prove his claims against the doctor by expert medical testimony of other doctors of the same school of medicine. Such testimony must be that in the opinion of the doctor-witness the defendant doctor did (or failed to do) some particular thing or things that physicians and surgeons of ordinary skill, care, and diligence would not have done (or would have done) under similar circumstances. If the patient failed to produce such testimony, then the case was withdrawn from the jury's speculation and judgment entered for the defendant-doctor as a matter of law by the court.

Once the patient has produced such testimony, however, then it becomes the province of the jury to weigh the probative value of such testimony and, in the event other doctors have expressed contrary opinions on behalf of the defendant-doctor, to determine from a consideration of all such opinions and all the other evidence what it finds the medical fact to be in the case before it, namely, whether the defendant-doctor "did (or failed to do) some particular thing or things that physicians and surgeons of ordinary skill, care, and diligence would not have done (or would have done) under similar circumstances." When doctors' opinions differ, the jury and only the jury has the power and the duty to resolve those differences.

There has long been an exception to this rule, inherent in the rationale of the rule itself, namely, that when the act complained of by the patient is so simple as to be within the lay knowledge of the average citizen-juror, then the patient need not produce expert medical testimony but is entitled to have his case submitted to the jury for determination w i t h o u t such proof.[18] For example, such claims as severe burn following a mere x-ray picture to reveal a fracture,[19] foreign bodies left in the tissues,[20] hot-water bottle burns,[21] failure of the doctor to attend the patient frequently enough,[22] have been held to fall within this exception. The rationale is clear: in such cases "the particular thing or things" complained of is within the lay experience of the average juror and therefore the jury can form an intelligent opinion without the guidance of expert medical testimony, whereas in the case of a complicated medical procedure the jury, without medical testimony to give it a yardstick by which to measure the defendant-doctor's conduct, can form no opinion beyond mere guess or speculation.

There is a second exception in the law to the fundamental rule that he who accuses must prove, which has sometimes been applied to malpractice cases. That exception is known by the Latin phrase *res ipsa loquitur.*

Res Ipsa Loquitur

Originally the offspring of a casual word

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[15]92 N.E. 2d 393 (Ohio, 1950); 91 N.E. 2d 256 (Ohio, 1950).

[16]193 N.E. 401, 404 (Ohio, 1934).

[17]164 N.E. 518, 520 (Ohio, 1928).

[18]154 N.W. 923 (Iowa, 1915); 94 N.E. 2d 706 (Ohio, 1950); 185 N.E. 210 (Ohio, 1933); 135 P. 235 (Wash., 1913).

[19]136 N.W. 741 (Minn., 1912). When injury occurs in diagnostic use of x-ray, majority of courts hold *res ipsa loquitur* applicable but for injury occuring during therapeutic use of x-ray, the courts are divided on the applicability of *res ipsa loquitur.* See discussion in 152 A L R 638.

[20]247 N.W. 911 (Mich., 1933).

[21]4 Cal. 2d 68 (Cal., 1935).

[22]185 N.E. 210 (Ohio, 1933).

of Baron Pollock during legal argument,[22] the phrase translated means nothing more than "the thing speaks for itself." Around this phrase there has evolved a legal doctrine that has been severely criticized: "It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule."[24]

Basically the doctrine is simply this:

> Negligence may be proved by circumstantial evidence. One type of circumstantial evidence to which the courts have given the name res ipsa loquitur, arises where
>
> (a) the accident is of a kind which ordinarily does not occur in the absence of someone's negligence, and
>
> (b) It is caused by an instrumentality within the exclusive control of the defendant, and
>
> (c) The possibility of contributing conduct which would make the plaintiff (patient) responsible is eliminated.[25]

The renowned Justice Holmes, while still on the bench of the Supreme Judicial Court of Massachusetts, in his usual terse style defined it simply, thus:[26]

> 'Res ipsa loquitur,' which is merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort, usually are for the jury. The court ordinarily confines itself to considering whether it can say that there is no such presumption, or, in other words, that such accidents commonly are not due to negligence.

Historically, this principle has been applied to cases of falling objects,[27] explosions,[28] railroad derailment,[29] etc., wherein the object was in the exclusive control of the defendant and the accident was of a kind that does not ordinarly occur in the absence of someone's negligence.

The doctrine has also been invoked, however, in cases where from the very occurrence of the events themselves the injured party knew and could know nothing of what has happened to him, but the defendant had such knowledge available to him.[30] To invoke the general rule that he who accuses must prove in such circumstances seemed so harsh and unfair that some courts uttering the phrase *res ipsa loquitur* turned to the defendant requiring him to furnish the explanation of what happened and to show that the occurence was due to no negligence on his part. This extension of the doctrine would seem to make of *res ipsa loquitur* merely a rule of sympathy rather than a rule of law and has been severely criticized in many quarters.[31] When extended to medical malpractice cases, this "rule of sympathy" becomes exceedingly unfair to the defendant-doctor, for it can be applied to every case of an untoward result following any operation wherein the anesthetized patient knows nothing of what occurred to her, whereas the surgeon has some knowledge, with the result that the jury is forced to speculate with the rights of the surgeon—more often than not with disastrous financial conse-

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[22] 2 H & C 722 (1863); 1159 Eng. Rep. 299. Barrel rolled out of warehouse window and fell on passing pedestrian.

[24] (Dissenting opinion of Bond, C. J.) 152 A. 633, 636 (Md., 1930).

[25] Prosser on Torts, p. 291, Sec. 43, Parenthesis ours.

[26] 11 N.E. 61, 61 (Mass., 1895).

[27] 265 P. 238 (Cal., 1928).

[28] 227 S.W. 631 (Mo., 1921).

[29] 39 N.Y. 227. (N.Y., 1868).

[30] 38 American Jurisprudence, P. 995, Negligence, Sec. 299.

[31] Prosser—Law of Torts (2d Ed. 1955) p. 209. Circumstantial Evidence — Res Ipsa Loquitur "Courts frequently have said and occasionally have held that the doctrine cannot be applied unless evidence of the true explanation of the accident is more accessible to the defendant than to the plaintiff. It is difficult to regard this factor as anything more than a make weight, or to believe that it even can be controlling . . . if the facts give rise to no such inference, a plaintiff who has the burden of proof in the first instance could scarcely make out a case merely by proving that he knew less about the matter than his adversary." Regan, L. J.: Doctor and Patient and the Law (3rd Ed. 1956) p. 214, 227.

quences to the surgeon.[32]

Medical Malpractice and "Res Ipsa Loquitur"[33]

Perhaps a simple but basic observation is here in order. Generally (with local variations to be sure) medicine is medicine everywhere. Mumps is mumps in England or in Australia. Not so the law! The law in one state may not be the law in another state. In fact, if the court of last resort has not spoken, the law in one county may differ from that in another county of the same state. This results in different laws in each of the 48 states and a body of federal law besides. However, in the main, these are but local variations, for the law in most of the states was patterned on the common law in England which gives our state law a common heritage and basis. Since this monograph is directed to physicians and surgeons practicing medicine all over the United States, no attempt will be made to cover the law of all jurisdictions, but cases will be discussed on the basis of their contribution to the medical profession's understanding of the general problem regardless of the jurisdiction in which the cases arose and were decided.

In one case[34] the Supreme Court of North Carolina said:

> Much loose discussion has been given to the question of the availability of res ipsa loquitur in medical and surgical cases involving charges of malpractice. Our own court has been somewhat restrictive in applying the doctrine. The restrictions, none too well defined and, therefore, the source of controversy, seem to spring from the recognized and often repeated rule that a physician or surgeon is not a guarantor of the result of his treatment. Some further obstacles to the application of the doctrine in certain connections have arisen from two conflicting theories, which we sometimes find advanced in the same case: First, that the practice of medicine and surgery is largely empirical (which means unscientific), therefore, the doctrine would have little or no significance; and, second, that these professions are so highly scientific that the doctrine or inference would have no meaning except to men learned in the profession, certainly not to a jury. Either way you put it, on these theories all facts are considered consistent with proper treatment until professionally shown to be otherwise.
>
> It follows, from the rule that the physician or surgeon is not an insurer of results, that no presumption can arise from the mere result of a treatment upon the theory that it was not satisfactory or less than could be desired, or different from what might be expected . . . We must not be understood as holding that under no circumstances might the condition in which the plaintiff has been left, as a result of the treatment, give rise to the presumption of res ipsa loquitur, or that under no circumstances may a treatment, however unreasonable and plainly destructive of the curative purpose, give rise to the doctrine, despite the empiric and professional veil. Such cases must stand upon their own bottom.
>
> But where proper inferences may be drawn by ordinary men from approved facts which give rise to res ipsa loquitur without infringing this principle, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not happen in the ordinary course of things, when proper care is exercised.

The Supreme Court of California has said:[35]

> Moreover, such a rule is not justified by either reason or authority.
>
> The law has never held a physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence

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[32]See Footnotes 7 through 10.

[33]See generally the following annotations or articles: 141 A.L.R. 5. Necessity of expert evidence to support an action for malpractice against a physician or surgeon. 152 A.L.R. 638. *Res ipsa loquitur* as applicable in case of injury by x-ray. 162 A.L.R. 1265. Physicians and Surgeons: presumption or inference of negligence in malpractice cases; res ipsa loquitur. 13 A.L.R. 2d 11. Proximate cause in malpractice cases. Regan, L. J.: Doctor and Patient and the Law (3rd Ed. 1956) pp. 214-229. Louis J. Regan—"Medical Malpractice" (1943), pp. 89-94. Hayt, Hayt, and Groeschel: Law of Hospital, Physician & Patient (2d Ed. 1952), pp. 448-9, 462, 466, 420.

[34]13 S.E. 2d 242, 244 & 245 (N.C., 1941).

[35]88 P. 2d 695, 697 & 698 (Cal., 1939).

in applying that learning and skill to the treatment of his patient. . . . Whether he has done so in a particular case is a question for experts and can be established only by their testimony. . . . And when the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen, the expert evidence is conclusive. . . . Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient. . . .

It is true that in a restricted class of cases the courts have applied the doctrine of res ipsa loquitur in malpractice cases. But it has only been invoked where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. For example, it has been applied where a sponge was left in the body of the patient after closing an operative incision . . . . ; where the patient was burned by the application of hot compresses or heating apparatus . . .; where the patient was burned through the operation of an X-ray machine . . .; and where the patient sustained an infection through the use of an unsterilized hypodermic needle . . . In each one of these situations the rule was applied because common knowledge and experience teaches that the result was one which would not have occurred if due care had been exercised."

No one can quarrel with these statements. They meet the safeguards against jury speculation laid down by the law. In those cases where "the particular thing or things" done or left undone by the defendant-physician are so gross as to be obvious to the lay juror and well within his nonmedical lay experience, the law rightly does not require reiteration of them by expert medical testimony. For in such instances the lay jury is competent to form an opinion of its own without such medical guidance and its verdict so reached is not speculation or guess, but grounded on its own experience.

What is alarming is the recent tendency in some courts toward extending this perversion of the doctrine of *res ipsa loquitur*, which for lack of a better term we have characterized as a "rule of sympathy," into the medical malpractice field wherein untoward results may occur during conditions (such as found in every operation wherein the patient because of the anesthetic knows nothing of what occurred) appealing to the natural sympathy of the courts. The outcome is often disastrous to the medical profession because the "rule of sympathy" removes the safeguard of the law preventing jury speculation, that he who accuses a doctor of malpractice in his chosen profession must prove that malpractice by expert medical testimony from members of that same profession, qualified by training and experience to have intelligent opinions, not guesses, concerning the propriety of the acts complained of. For when forced to speculate, the jury's natural sympathy for a personal injury with its attendant pain and suffering often colors its guesswork to the deteriment of the defendant-doctor.

Perhaps an example will make the problem clear. We have quoted with approval the Supreme Court of California's statement of *res ipsa loquitur's* limited application in medical malpractice cases.[26] That case was decided in 1939. The medical facts involved were that during an operation upon plaintiff's knee, the peroneal nerve was severed or injured so as to cause plaintiff to suffer thereafter from a "foot drop," where it was admitted that the peroneal nerve was in the operative field, and where there was medical testimony that, although the severance of the peroneal nerve is something which ordinarily does not occur in operations such as that performed by the defendant, yet even when the precautions prescribed by the approved technique are taken, there is a break or injury of it in between 5 and 9% of the cases.

The patient contended that since he was unconscious at the time, that the defendants had charge of the operation, that the result suffered by him does not ordinarily occur, and that in the absence of an explanation by the defendants justifying a verdict in their favor upon the ground they were not negligent, they were liable to him in damages.

In holding the doctrine of *res ipsa loquitur* inapplicable to these medical facts and

[26]See Footnote 33.

that the patient would therefore have to prove through a qualified doctor-witness that in his opinion the injury to the peroneal nerve appearing after the operation was due to the negligence of the defendant-surgeon in doing (or leaving undone) some particular thing or things which a surgeon of ordinary skill, care and experience would not have done (or would have done) under similar circumstances, the Supreme Court of California said:[37]

> If this were the rule, as a practical proposition, no surgeon could ever operate without being an insurer of a medically satisfactory result . . . Probably in every operation there is some hazard which the medical profession recognizes and guards against but which is not always overcome. To say that the doctrine of res ipsa loquitur allows the recovery of damages in every case where an injury does not ordinarily occur, would place a burden upon the medical profession which the law has not heretofore laid upon it. . . .
>
> It is true that in a restricted class of cases the courts have applied the doctrine of res ipsa loquitur in malpractice cases. But it has only been invoked where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. . . . But the present case shows an entirely different situation. Here what was done lies outside the realm of the layman's experience. Medical evidence is required to show not only what occurred but how and why it occurred. That evidence establishes beyond question not only that the peroneal nerve may be injured even where due care is used but that this unfortunate result invariably occurs in a limited number of cases.

In 1944, however, the same court found no difficulty in invoking the rule of sympathy version of the *res ipsa loquitur* doctrine against the defendant-doctors in the following medical situation:[38] The patient consulted Dr. T. who diagnosed his ailment as appendicits, and made arrangements for an appendectomy to be performed by Dr. S. at a hospital owned and managed by Dr. Sw. Plaintiff entered the hospital, was given a hypodermic injection, slept, and later was awakened by Drs. T. and S. and wheeled into the operating room by a nurse whom he believed to be defendant G., an employee of Dr. S. Dr. R., the anesthetist, also an employee of Dr. Sw., adjusted the plaintiff for the operation, pulling his body to the head of the operating table and, according to plaintiff's testimony, laying him back against two hard objects at the top of his shoulders, about an inch below his neck. Dr. R. then administered the anesthetic and plaintiff lost consciousness. When he awakened he felt a sharp pain about halfway between the neck and the point of the right shoulder. The pain spread down to the lower part of his arm, and after his release from the hospital he developed paralysis and atrophy of the muscles around the shoulder.

The plaintiff also consulted Dr. C., who had x-ray pictures taken, which showed an area of diminished sensation below the shoulder and atrophy and wasting away of the muscles around the shoulder.[39] In the opinion of Dr. C. plaintiff's condition was due to trauma or injury by pressure or strain applied between his right shoulder and neck.

Dr. G. expressed the opinion that plaintiff's injury was a paralysis of traumatic origin, not arising from pathological causes, and not systemic, and that the injury resulted in atrophy, loss of use, and restriction of motion of the right arm and shoulder.

To justify its applicatin of *res ipsa loquitur* to these medical facts, the Supreme Court of California said:[40]

> There is, however, some uncertainty as to the extent to which res ipsa loquitur may be invoked in cases of injury from medical treatment. . . . If the doctrine is to continue to serve a useful purpose, we should not forget that "the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the *circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but*

[37] 88 P. 2d 695, 697 & 698 (Cal., 1939).
[38] 154 P. 2d 687 (Cal., 1944).
[39] 154 P. 2d 687, 688 (Cal., 1944). Comment: Just how Dr. C's x-ray film was able to reveal diminished sensation and muscle atrophy is unexplained.
[40] 154 P. 2d at p. 689 (Cal., 1944).

inaccessible to the injured person. . . ."[41]

The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the *unconscious patient on the operating table.* Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconsious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who receives permanent injuries of a serious character, obviously the result of someone's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. . . .

The condition that the injury must not have been due to the plaintiff's voluntary action is of course fully satisfied under the evidence produced herein; *and the same is true of the condition that the accident must be one which ordinarily does not occur unless someone was negligent.* We have here no problem of negligence in treatment, but of distinct injury to a healthy part of the body not the subject of treatment, nor within the area covered by the operation. The decisions in this state make it clear that such circumstances raise the inference of negligence and call upon the defendant to explain the unusual result.

The language of this court's opinion leaves no doubt but that it is applying not *res ipsa loquitur,* but the "rule of sympathy" version. The court sympathizes with the unconscious patient who does not know what happened to him and so throws the defendant-surgeon into the lion's den of lay jury speculation, under the guise of *res ipsa loquitur.* We sympathize with the unconscious patient too. We agree that he is entitled to a full disclosure of the facts —of every detail of what went on while he was unconscious. But what he is not entitled to is *res ipsa loquitur.* One has to but look at the requirements of *res ipsa loquitur* to see that it cannot apply. First, the accident must be of a kind that ordinily does not occur in the absence of someone's negligence. While such complications do not occur frequently in operations, they can and do occur for no known reason and without negligence on anyone's part. It has always been a fundamental axiom of the law that the mere happening of an accident, no matter how disastrous the consequences, is no evidence that there has been negligence.[42] In fact the presumption is quite to the contrary: The defendant-doctor is presumed by the law to have used due care toward the patient in the practice of his profession.[43] Negligence must be proved by the patient who claims it. Secondly, the instrumentality claimed to have caused the accident was never identified. Nor was it shown that anyone of the several defendants had exclusive control over it—for exclusive control by the defendant has always been one of the basic requirements of *res ipsa loquitur.*[44] Concerning these aspects the court has this to say:[45] "Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act."

Furthermore, even the meager requirement of the rule of sympathy—that the evidence is more accessible to the defendant-doctor than to the plaintiff-patient—has not been met! The patient, no matter how unconscious during the operation, has no trouble obtaining all of the facts if he hires a competent attorney. Today all jurisdictions have broad rules of discovery, which compel production of all testimony in advance of trial so that every fact is known. In his work "Modern Trials" Melvin M. Belli, a member of the California Bar, who has obtained outstandingly large verdicts for patients against members of the medical profession, reveals this in the very same chapter in which he urges further extension of the *res ipsa loquitur*

[41]All emphasis in quoted material represents the emphasis of the author of the article.

[42]164 N.E. 518, Syllabus Paragraph 1 (Ohio, 1928).

[43]70 Corpus Juris Secundum 989, Physicians & Surgeons Sec. 62, Evidence (a) Presumptions.

[44]See Footnote 25.

[45]154 P. 2d. at p. 690.

doctrine in the malpractice field. Says Belli:[46] ". . . depositions of every one of the doctors were taken, as provided by the California procedure. . . . These depositions were bound. Then I added the complete set of medical records from the hospital (*subpoenaed duces tecum* under the California procedure and Photostated). These records and testimony made a volume over six inches high. *Nothing further could be said at the trial.*"

In view of the California rules of discovery, so broad as to furnish the patient before trial every ounce of testimony that could be said at the trial, how can the Supreme Court of California honestly say that "the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him (the defendant-surgeon) but inaccessible to the injured person."[47] Under modern pretrial discovery practice, we can see no justification for this "rule of sympathy" extension of the doctrine of *res ipsa loquitur*. Not only are the records available to the patient under modern trial procedure, but those records, under modern medical procedure[48] contain strict, accurate, full accounts of everything that went on, placed on the record shortly after the event took place and long before litigation arose, and in some instances even before the untoward result began to show itself.

The vice inherent in this rule of sympathy is not that it forces the doctors to go forward and furnish an explanation—the patient got that in full detail long before the trial began—the vice lies in the fact that once the court has invoked this rule, it then hurls the doctor into the lion's den of jury speculation without proof of negligence on his part by anyone, on the theory that *res ipsa loquitur*, once applied, requires jury determination no matter how adequate the doctor's explanation may be. This is not a legal requirement of the rule,[49] but as a practical matter it is almost universally the result.[50]

Under the rule, a full explanation by the defendant-doctor, consistent with no negligence on his part, may negative the inference otherwise arising.[51] Thus, in a case involving a surgeon cutting into the bowels during a hernia operation, the Supreme Court of Indiana said:[52]

> ". . . the doctrine of res ipsa loquitur does not prevail where the party against whom it might apply accepts the duty of going on with the proof and details the entire transaction. In such a situation the presumption, inference or doctrine cease to exist and all questions concerning the injury must be determined from the evidence unaided by inference or doctrine of res ipsa loquitur."

What is the vice in jury speculation? Jurors are human beings, with all of the natural sympathy for the pain and suffering that accompany the untoward result. Jurors try to be fair, but when confronted with a task too great for them, they, like all of us taken out of our own field, become easily confused and hopelessly dependent on others for their expert opinions, having no experience of their own from which to form a judgment of the conduct involved.

This is especially true when one adds to their lack of specialized knowledge of the subject, all the tricks and clever innuendo at the command of any able trial counsel. One recalls Socrates' classic definition of a lawyer (then called rhetorician): "One who makes the worser appear the better cause." The danger to the doctor is that his professional conduct must be judged, not by his fellow medical practitioners who have the training and experience to competently and fairly judge him, but by 12 lay people who have no medical proof of his claimed negligence to guide them, but only can speculate as to his conduct as against the obvious and sometimes tragic untoward result. In their blind groping, the jurors have no trained background to enable them to appreciate the "medical facts of life," which confronted the surgeon when he undertook the task and which, without fault on his part, or on anyone's part, may predestine an untoward tragic result. As one able surgeon testified in one of our malpractice cases:[53]

> Q. Now, Doctor, from your examination of Mrs. X and your treatment of her, do you have an opinion whether

[46]Belli, M. V.: Modern Trials, Vol. 3, p. 1998, Medical Malpractice, Res Ipsa Loquitur.

[47]154 P. 2d at p. 689.

[48]See Rules of American Hospital Assn. governing hospital records.

[49]See 38 American Jurisprudence, p. 1005, Negligence—Res Ipsa Loquitur Sec. 308. And see 110 N.E. 2d 337. (Ind. 1953).

[50]See Prosser Law of Torts (2d Ed. 1955) p. 216, Col. 2; See Regan, L. J.: Doctor and Patient and the Law p. 215 (Section 30 Res Ipsa Loquitur).

[51]38 American Jurisprudence p. 1001 Footnote 9 Negligence Sec. 304.

[52]110 N.E. 2d 337, 340 & 341 (Ind., 1953).

[53]88 N.E. 2d 76, (Ohio, 1949).

she was more likely to develop a fistula, following a total hysterectomy, than a normal person would?

A. In the general class of patients that come to us for the repair of vesical-vaginal fistulas—in many who come for removal of their uterus there has been a long period of inflammation in the pelvis or lower portion of the abdomen and in the tubes, which has been annoying; many times it has been that the patient has previous operations on the tubes or the uterus, or suspending the uterus, or different types of gynecological or female operations. So that this general class of patients, by the time they came to us, are already incapacitated so far as their local structures are concerned. The anatomy is considerably distorted and the blood supply very very often impaired. Consequently one hesitates to make these vesical-vaginal fistulas at all, for repair, because just such things as you see now very often is the result. The patient does not understand the difficulties of the operation. They just go by results. No thought concerning the difficulty of the technicalities of the case.

Now in this particular patient there was a history of previous pelvic disease. There was an operation before, which involved her tubes.

It was with that history of prolonged inflammatory disease, in her pelvis, that she consulted the doctor, the defendant. It was after his operation, that I saw her.

Now, to answer the question, I think that this kind of a case would be predisposed to a vesical-vaginal fistula or other complications of which you could mention numerous, different kinds of complications. The answer has to be "Yes" because this is not an attractive type of surgery, to start with. As the boys say, you might say you have one or two strikes on you before you presume to contract with the patient for a nice job."

This is the vice inherent in *res ipsa loquitur*. It forces the jury to judge a doctor's highly specialized acts without permitting that jury the medical education it needs and is entitled to in order to correctly and fairly form that judgment. It is, indeed, unfair to the jury itself.[54]

And in a day of inflationary, astronomically large verdicts running into the hundreds of thousands of dollars, it is manifestly unfair to the defendant-doctor and even can be ruinous.

The Supreme Court of California has continued its rule of sympathy trend. In 1948 it had before it the following medical situation:[55] Preparatory to a varicose vein operation the defendant dipped a silver nitrate pencil supplied by the hospital into water and outlined on the patient's legs the veins that were to be removed; shortly afterwards her legs began to burn and became very inflamed around the areas marked by the defendant; and in a short time blisters formed at such areas. The defendant testified that silver nitrate produces a stain that lasts 10 to 14 days; that the purpose of such markings is to outline the veins to be removed; that ordinarily there is no unfavorable reaction from the application of silver nitrate; that plaintiff, however, had such a reaction and was burned; that plaintiff had a very fair skin; that it was the common practice of doctors in San Francisco to mark off the area to be operated upon with a silver nitrate solution; and that it was also standard practice in this area to mark off the operating area without first making any tests.

The trial court refused to apply *res ipsa loquitur* and entered judgment for the defendant-doctor. A majority of the Supreme Court held that *res ipsa loquitur* applied saying:[56]

> It is our opinion that the doctrine in question is applicable to the facts here involved. . . .
>
> If the solution was too strong defend-

[54]In 88 N.E. 2d 76, the jury was unable to reach any decision being bitterly divided into two groups concerning the question of whether or not the appearance of a vesico-vaginal fistula some four months after total hysterectomy in the patient described above (see Footnote 46) was due to the patient's claim that the defendant surgeon admitted afterward that "I nipped her bladder" or merely to a post-operative complication brought on by the weakening of the bladder wall by the pre-existing adhesions and surgery. The Court of Appeals entered final judgment as a matter of law in favor of the defendant-surgeon on the patient's failure to prove the defendant negligent by expert medical testimony. That the alleged admission "I nipped her bladder" will not supplant the need for expert testimony, see 284 P. 803 (Wash., 1930) in addition to 88 N.E. 2d 76.

[55]192 P. 2d 771, 772 (Cal., 1948).

[56]192 P. 2d 771, 773 (Cal., 1948).

ant or someone was negligent. If plaintiff was peculiarly susceptible to silver nitrate it was a question of fact whether defendant should have taken steps to ascertain that fact. At any rate, such susceptibility would be a matter of defense. One judge dissenting remarked:[57]

It does not follow that because an injury does not ordinarily occur, in the rare instance in which an injury does occur the doctrine of res ipsa loquitur will permit the recovery of damages. "To say that the doctrine of res ipsa loquitur allows the recovery of damages in every case where an injury does not ordinarily occur, would place a burden upon the medical profession which the law has not heretofore laid upon it. Moreover, such a rule is not justified by either reason or authority."

* * *

"The law has never held a physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. . . . *Whether he has done so in a particular case is a question for experts and can be established only by their testimony. . . . And when the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen,* the expert evidence is conclusive. . . . Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient. . . .

"Upon a mere showing that burns resulted from defendant's application of silver nitrate, can a layman say that the result was one which would not have occurred if due care had been exercised? . . . Here what was done lies outside the realm of the laymen's experience."

In March, 1955, the Supreme Court of California had this medical situation before it:[58] A routine obstetrical case; patient in good health and mother of four children; spinal anesthetic by defendant W., doctor of medicine and a specialist in anesthesiology. The birth of the child followed spontaneously within a few minutes. Dr. H. was the delivering obstetrician. On the following morning plaintiff complained of pain in both legs and difficulty in moving them. She had pain in her back, neck, and head; also in her arms and wrists. Within two or three months thereafter, she regained the use of her right leg. At the time of trial, she still had pain in her left hip. However, she was able to bear some weight on her bent left ankle, and could get around much better.

The case was tried on the following theories of liability: (1) Dr. W. for negligence in administering the spinal anesthetic; (2) Dr. H. for knowingly permitting Dr. W. to so administer it; (3) the hospital as employer; (4) all three defendants under the doctrine of *res ipsa loquitur* as joint venturers, and for failure to call in a neurosurgeon and to arrange for a laminectomy.

Dr. W. testified that it was his opinion that the plaintiff's (spinal) nerve roots had been affected by the anesthetic solution used by him. The plaintiffs introduced in evidence hospital records that showed that Dr. W. arrived in the hospital delivery room at 9:00 p.m. and that two minutes later, at 9:02 p. m., the spinal anethetic was completely administered. Plaintiffs introduced in evidence the written report of Dr. C., defendant hospital's staff neurologist, wherein he stated that Mrs. S.'s condition "indicated cord damage on the left in the lumbar region." Dr. W. unequivocally testified that he inserted his anesthetic needle in Mrs. S.'s spine at the interspace between the fourth and fifth lumbar vertebrae. Also that he used the standard accepted kind and amount of anesthetic normally used in obstetrical cases, and that there was no contraindication in the use of a spinal in this case.[60]

Doctor, after this some two days on the witness stand, nobody has yet asked you, do you now have an opinion as to the cause of this woman's condition?

Doctor W. replied:

My opinion is that the cause of this

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[57]192 P. 2d 771, 776-7 (Cal., 1948).
[57a]188 P. 2d 12, 17 (Cal., 1948).

[58]281 P. 2d 278, 280 & 281 (Cal., 1955).
[60]281 P. 2d 278, 282 (Cal., 1955).

condition is a combination of two things, an unusual or altered reaction to the drugs she received. Q. The anesthetic, you mean? A. The anesthetic drugs that she received, plus a factor of functional overlay, psychic overlay. Q. So that, Doctor, tell us whether it is or is not true that in a certain small percentage of cases you do find a person who is sensitive to spinal anesthesia? . . . A. Yes. . . . Q. Does that happen, Doctor, in this small percentage of cases entirely without regard to any negligence on the part of the doctor? A. Yes. Q. Now, Doctor, one other question toward the last of this examination: You said in this case you did not consider or recommend the doing of a laminectomy. Will you explain that answer to us, please? A. Well, it was my feeling that, in view of the condition as it developed, there was no indication of any cord damage being present in this patient; that in the absence of cord damage, there would be no indication at all for doing a laminectomy.

The patient's own doctor was asked:[60] ". . . 'Were you able to form an opinion as to what the cause of this woman's difficulty is?' He answered: 'I really don't know the answer to that.'" He also testified that there was a functional overlay in appellant's case.

In refusing to apply *res ipsa loquitur* to this situation the Supreme Court of California said:[61]

> And as stated in Ayers v. Parry, 3 C. R., 192 F. 2d 181, 185, a case decided by the U. S. Cir. Court of Appeals, involving application of New Jersey law:
>
> "We think it is beyond dispute that the nerve roots which were damaged in the process of producing anesthesia by injecting the drug into the spinal column are within the region of treatment and that the cause of this injury to the nerve roots and its effect on the leg and adjacent organs must be explained by experts. When the expert testimony offered by the plaintiff ascribes the cause to the toxic quality of the injected drug as distinguished from the negligence of the anesthetist, that evidence is binding upon the court and the jury would not be permitted to speculate to the contrary."

Likewise here. Defendant W. met the qualifications required of an expert. His testimony established that the spinal anesthetic was administered in accord with accepted medical standards in the community. Moreover, believing that the damage here was to the nerve roots and not to the spinal cord, his diagnosis that a laminectomy was not indicated was also in accord with good medical practice.

Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. . . .

The record before this court fails to disclose any evidence tending to establish negligence on the part of either Dr. W. or Dr. H. in their care or treatment of Mrs. S. . . .

It further appears that the doctrine of res ipsa loquitur may not be invoked by appellants.

In the instant case, an inference may be drawn from substantial evidence in the record that the injury to Mrs. S. was not caused by negligence but was caused by some condition existing in the patient's system.

Rehearing was denied the patient in April.[62] However, in May such rehearing was granted and thereafter in December, 1955,[63] the Supreme Court of California reversed itself, and set aside its former opinion and applied *res ipsa loquitur* to this medical situation. Further rehearing was denied to the defendant-doctors.[64] In reversing itself, the Supreme Court of California said:[65]

> From this evidence, it could have been legitimately inferred by the jury that plaintiff S's injuries were proximately caused from spinal cord damage caused by a spinal anesthetic administered between the twelfth thoracic and the first lumbar vertebrae; that a spinal anesthetic administered in that location was not good medical practice, or the exercise of that care and caution expected of a practicing physician in that community. . . .
>
> Plaintiffs and defendants agree that

[60] 281 P. 2d 278, 282, 283 (Cal., 1955).
[61] 281 P. 2d 283, 284 (Cal., 1955).
[62] 281 P. 2d 278 (Cal., 1955).
[63] 291 P. 2d 915 (Cal., 1955).
[64] 291 P. 2d 915 (Cal., 1955).
[65] 291 P. 2d 915, 922, 923, 924 (Cal., 1955).

the conditions to be met before the doctrine may be applied are that the accident, or injury must be of a kind which ordinarily does not occur in the absence of someone's negligence; that it must be caused by an agency or instrumentality in the control of the defendant; and that it must not have been due to any voluntary action or contribution on the part of plaintiff. . . .

Plaintiffs argue that it is a matter of common knowledge that a woman does not ordinarily become permanently paralyzed following childbirth after having had a spinal anesthetic administered as an incident thereto; that Dr. H. testified that "ordinarily where due care (was) used and proper practice followed, permanent paralysis (did) not follow"; . . .

Defendant W. argues that paralysis may result from a number of causes other than negligence in giving a spinal anesthetic; that in a certain percentage of cases paralysis will result from spinal anesthesia without any negligence; that plaintiffs introduced no proof that the practice used by him in administering the anesthetic was not the desirable or standard practice; . . .

. . . the applicability of the doctrine of *res ipsa loquitur* depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of their (defendants') negligence. (Citations) "Where no such balance of probabilities in favor of negligence can be found, *res ipsa loquitur* does not apply." . . .

"Another factor which some of the cases have considered in applying the doctrine is that the defendant may have superior knowledge of what occurred and that the chief evidence of the cause of the accident may be accessible to the defendant but inaccessible to the plaintiff. . . ."

This factor is peculiarly applicable, as well as necessary, in the type of situation we have here—where a patient suffers injury while unconscious and in the care and custody of the defendant, or defendants.

It would appear the plaintiffs have made out a prima facie case by both medical testimony and common knowledge that the injuries suffered by Mrs. S. are not such as usually occur in the circumstances without negligence on the part of someone. Defendant W's assertions to the contrary are matters for the finders of the facts.

Apparently Mrs. S. was unconscious at the time the spinal anesthetic was administered. Defendant W. contends that her condition could have been caused by a number of causes other than negligence in giving the anesthetic. There is no doubt that when Mrs. S. went to the delivery room she was in good health. . . . We also said that "where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct. . . . a patient injured while unconscious on an operating table in a hospital could hold all or any of the persons who had any connection with the operation even though he could not select the particular acts by the particular person which led to his disability." . . . In order that a plaintiff be entitled to the benefit of the doctrine of res ipsa loquitur, he need not exclude every other possibility that the injury was caused other than by defendant's negligence. . . . "Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur are present." . . . The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff had produced sufficient evidence to permit the jury to draw the inference of negligence, even though the court itself would not draw that inference; . . . The inference of negligence is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it. . . . The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the *right of the jury to find those facts must be carefully preserved.*

Here the Court is saying that the patient not only need not prove that the

defendant-doctor was negligent but that to satisfy the basic requirement of the rule of *res ipsa loquitur* (that the injury must be of a kind which ordinarily does not occur in the absence of someone's negligence) the patient need only show enough that the court cannot say that reasonable minds (of jurors) could not infer negligence even though the court itself would not infer negligence. This meager showing the patient evidently achieves merely by proving two readily conceded facts (1) that she was unconscious and (2) that she suffered an untoward result. We submit that this is not the doctrine of *res ipsa loquitur* at all but rather the rule of sympathy. As one California Judge remarked:[66] "A person about to undergo an operation is generally aware that there may be unforeseeable dangers incident thereto. He is entitled to an explanation of the conduct of the persons attending the operation, but he cannot reasonably expect them to be insurers of his safety."

A similar medical situation but with a very different legal result occurred in a Federal case involving New Jersey law.[67] There the medical situation was: the patient, with a history of two abdominal operations involving spinal anesthesia, underwent an emergency operation for an obstruction to the common bile duct. Spinal anesthesia was selected because the doctors were of the opinion that ether would be harmful to this patient's liver. Dr. H. administered the anesthesia agent through a needle inserted between the second and third lumbar vertebrae. This treatment was started at 9:50 p. m. The operation began at 10:10 p. m. and ended at 1:30 the next morning. During the operation gas, oxygen, and ether supplemented the spinal anesthetic. The common duct was located at about 1:00 a. m. whereupon the obstructing stones were removed and the cause of the infection was corrected.

Plaintiff testified that he was placed upon the operating table and assumed a "curled up" position to receive the anesthesia. He stated he "felt this jabbing of pain into my spinal column, and from that point on I had this terrific pain radiating down my (right) leg, such as a heavy electrical shock. I remember stiffening out. I remember screaming, and from that point on I fainted and do not know what happened until the next morning in bed." He also said he fainted from the pain. The next morning plaintiff found he could not move his right leg and partial paralysis, marked atrophy, and sensory changes in this leg and in adjacent organs have persisted to the time of trial and probably will be permanent.

Dr. R., an expert anesthetist, hypothesized that if the pain was experienced it was caused by the needle striking the nerve roots. Dr. D., a neurologist, testified that a painful reaction to the puncture needle was a "common experience." Dr. R. further stated that if a patient has pain on the insertion of the needle, followed by stiffening and unconsciousness, the recognized procedure is for the anesthetist to try to determine what caused the unconsiousness and further action would depend on what he learns. As to whether or not defendants should have proceeded with this operation under the circumstances, Dr. R. was unable to express an opinion.

According to Dr. D.[68] "this patient suffered an injury to the nerve roots in the lower end of the spinal cord." He said, "The particular region is known as the cauda equina. That is called a cauda equinal neuritis. That condition was produced by the spinal anesthesia. . . . The following nerve roots were injured, on the right side from the eleventh thoracic, all the lumbars and all the sacrals right down to the fifth sacral nerve root." He further said that the anesthetic agent "had a toxic effect on these nerve roots. . . . and that has given him the resultant paralysis, atrophy, and sensory changes, which are manifest on examination."

On cross examination Dr. A. agreed that the unfavorable reaction of plaintiff to the administration of the anesthetic was something that could not be predetermined and that it was one of the hazards of this anesthesia. He stated that the anesthetic solution produced a condition called[69] "archnoiditis, which is an inflammation about the spinal cord . . . that constricts and damages the nerves . . . and which occurs due to some unusual reaction on the part of the patient to that solution."

The United States Court of Appeals for the Third Circuit refused to apply the

[66] 188 P. 2d 12, 17 (Cal., 1948). Dissenting opinion of Traynor, J.

[67] 192 F. 181 (U.S.C.A. 3rd Cir., 1951).

[68] 192 F. 181, 183, 184 (U.S.C.A. 3rd Cir., 1951).

[69] 192 F. 181, 184 (U.S.C.A. 3rd Cir., 1951).

doctrine of *res ipsa loquitur* saying:[70]

> Occasionally expert testimony is not required where an injury results to a part of the anatomy not being treated or operated upon and is of such character as to warrant the inference of want of care from the testimony of laymen or in the light of the knowledge and experience of the jurors themselves. This situation arises when an ulterior act or omission occurs, the explanation of which does not require scientific opinion. . . . But where, as here, an injury to healthy tissue within the region of treatment constitutes an occurrence beyond the realm of the knowledge and experience of laymen, the issue of negligence with respect to that injury must be determined by expert testimony.
>
> We think it is beyond dispute that the nerve roots which were damaged in the process of producing anesthesia by injecting the drug into the spinal cord are within the region of treatment and that the cause of this injury to the nerve roots and its effect on the leg and adjacent organs must be explained by experts. When the expert testimony offered by the plaintiff ascribes the cause to the toxic quality of the injected drug as distinguished from the negligence of the anesthetist, that evidence is binding upon the court and the jury would not be permitted to speculate to the contrary....
>
> It was not proved affirmatively that this defendant failed to ascertain the cause of unconsciousness, but, even if we assume this to be the fact, the causal connection between the omission and the injury was not shown and cannot be inferred. . . . Since Dr. R. was unable to render an opinion as to whether the operation should have preceeded or whether it should have been stopped, a matter which clearly calls for expert testimony, it is axiomatic that a jury should not be permitted to hazard a guess. . . .
>
> Res ipsa loquitur does not apply in malpractice cases where the injury is one which may occur even though proper care and skill are exercised. From the medical testimony, this seems to be the case sub judice.
>
> The doctrine does not apply where common knowledge or experience is not sufficiently extensive to permit it to be said that the patient's condition would not have existed but for the negligence of the doctors. Here the record is barren of any accident, or ulterior act or omission, which produced the injury such as a "slip" or "awkward thrust" of an instrument, or the injection of a harmful substance into the spinal canal. The painful reaction to the puncture needle is described as a "common experience."
>
> . . . Because the unfortunate consequences suffered by plaintiff in themselves do not as a matter of common knowledge and experience reveal lack of skill in the anesthetist, scientific opinion is clearly necessary to throw light on the subject. Seldom, indeed, would physicians administer a spinal anesthetic if they are to be held responsible solely for an adverse reaction of the anesthetic on the nerve roots.

Comment

Thus the fallacy inherent in the rule of sympathy is that whenever a bad result follows an operation (where of course normally no such bad result occurs) it is presumed by the courts that the reason for the bad result must be some negligence on the part of the operating surgeon and therefore a lay jury is entitled to weigh the defendant-doctor's explanation of his conduct against such presumption without proof by expert testimony from another doctor of just what the defendant-doctor did wrong. In this situation the lay jury is forced to speculate between the defendant-doctor's explanation and the natural sympathy for the injured patient—with disastrous results to the defendant-doctor.

An interesting example of this occurs in "The Case of the Missing Uvula," a fa-

[70] 192 F. 2d 184, 185, 186 (U.S.C.A. 3rd Cir., 1951)

[71] A distinction is made in some of the cases between an injury occurring to healthy tissue within the field of operation and healthy tissue outside of the operation field, the courts being more prone to apply *res ipsa loquitur* to the latter while requiring proof of negligence in the former on the theory that no lay juror can tell about events within the field of operation without the aid of expert testimony whereas any one knows that in an appendectomy operation the eye normally is not damaged. (See 109 S.W. 2d 417 [Tenn., 1937] where *res ipsa loquitur* was not applied because of plaintiff's failure to prove that plaintiff was injured while under defendant's control, the court indicating that if such proof had been supplied res ipsa loquitur would have been applied where sound and unaffected member of eye is injured while patient is unconscious and under exclusive control of surgeon for appendectomy) See 162 A.L.R. 1265 at pp. 1307-1320.

vorite vehicle for malpractice cases.[72] The medical facts are almost always the same. The lawsuit is filed alleging that several years before the defendant-surgeon performed a tonsillectomy and adenoidectomy in which he, without consent, removed the patient's uvula. The defendant-surgeon has performed so many routine T and A's since he barely recalls the case but a check of his records and the hospital records reveals merely a routine case with uneventful recovery. Post-lawsuit medical examination of the child is had, which reveals that, sure enough, the uvula is now missing. While it is always possible for a surgeon to inadvertently snare out the uvula during such an operation, it is a rare occurrence and the defendant-surgeon is adamant that he did not do so. Should *res ipsa loquitur* apply? Yes, said the Supreme Court of California:[73]

> So far as an understanding of the operation involved herein is concerned, it would appear to be a matter of common knowledge that the removal of a portion of the soft palate and of the uvula is no part of a tonsillectomy. The location of the tonsils is a matter which is easily observable to anyone, and the location and function of the uvula and soft palate are matters of common knowledge, and of which the court can take judicial notice.

But is this a matter of common knowledge? After a rash of such lawsuits we went into "The Case of the Missing Uvula" rather carefully and discovered that the contraction of scar tissue at the site of each tonsil following this operation sets up a transverse force which tended to stretch the soft palate outward in each direction from its center, which force, over a period of time, simply stretches the uvula out of existence. This was borne out by the fact that in none of our lawsuits did the patient exhibit any evidence of scar tissue at the site of the alleged surgically amputated uvula. (In subsequent malpractice lectures we suggested that the surgeon protect himself against the case of the missing uvula by charting the fact in the hospital record that subsequent to the operation and prior to discharge the throat was inspected and the uvula was intact.) It was further borne out by the medical literature,[74] one of which forewarned of possible malpractice litigation.[75]

> Atrophy of uvula.—We have seen two or three cases, and heard of others, where there was no suspicion of traumatism of any kind to the uvula, during operation, and it was seen to be intact and unimpaired before the patient left the table. Yet within ten to twenty days, the uvula has, without any appearance of bruising, traumatism, swelling or inflammation, quietly shrunk, and atrophied to a small, wasted prominence, or entirely disappeared. In one case, there was slight cleft-palate speech for a time, but this disappeared.
>
> It is well to note this possibility, as medico-legal action might be concerned with it.

What then is to be said for the case of the missing uvula? Is it fair to apply the doctrine of *res ipsa loquitur*? Plaintiff was unconscious, the defendant surgeon was in control, normally the uvula is not removed, yet plaintiff has lost her uvula. From the facts of the missing uvula is it fair to the surgeon to raise an inference that he was negligent and thus hurl him into the lion's den of jury speculation and permit the lay jury to speculate, without any appreciation whatever of the medical facts involved? We submit that it is not. For the basic requirements of *res ipsa loquitur* have not been met, namely that the injury is such that it would not have occurred unless the surgeon in control was negligent. Regardless of the skill of the surgeon, scar tissue will form and will contract. To permit a lay jury to speculate about such highly medical facts is to convert the doctrine of *res ipsa loquitur* into the rule of sympathy for the unconscious patient.

Very recently a trial court in California applied *res ipsa loquitur* to a vascular surgeon and a hospital in a case of transverse myelitis following translumbar aorto-

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[72]For other reported cases involving missing uvulas, see 194 N.W. 917 (N.D., 1923); 11 P. 2d 141 (Okla., 1932); 83 S.W. 2d 955 (Texas, 1935); 79 P. 2d 136 (Cal., 1938).

[73]79 P. 2d 136, 138 (Cal., 1938).

[74]Froeschels, E.: Uvula and Tonsils, Arch. Otolarying. 50: 216-219 (Aug.) 1949. Diseases of Nose and Throat, Thomas and Negus, ed. 5, 1949, p. 451.

[75]Thomas and Negus, "Diseases of The Nose and Throat" at p. 451. See Footnote 60.

graphy.[76] At the trial it was difficult to establish what in fact caused the paralysis, as there is very little in the literature concerning such a complication, although a few have been reported. It was the defendant-doctor's opinion, and that of another expert, that there had been an occlusion of the blood supply to the spinal cord, which resulted in necrosis of the cord. The third expert, a neurosurgeon, was of the opinion that the complication was due to a toxic reaction to the drug.

There was no direct testimony that standard practice was not followed either by the hospital and its employees or by the defendant-doctor. An independent medical expert called on behalf of the plaintiff to testify was not permitted to express an opinion on the standard practice in the community in the performance of aortography, on the ground that he was not qualified in the field. The defendant-doctor had performed 50 such aortograms with no untoward results.

The trial court denied defendants' motion for a nonsuit and directed verdict on the theory that the doctrine of *res ipsa loqitur* was applicable and submitted the case to the jury on this doctrine. The court did not require proof of negligence by the plaintiff. In applying the doctrine of *res ipsa loquitur* to the case, the trial court instructed the jury that there was a presumption or inference of negligence from the untoward result, which it was incumbent upon the defendants to explain away. The trial court's instructions, in effect, made the attending physician responsible for practices with untoward results, even though he was not in attendance at the time.

The jury rendered a verdict in favor of plaintiff against both defendants in the sum of $250,000. This was reduced by the trial court to approximately $215,000 and the case is now on appeal by both defendants.

The action of the trial court in applying the doctrine of *res ipsa loquitur* to this situation and thus permitting the plaintiff to submit his case to the jury without medical proof of negligence in the application of the aortography, places upon the defendant-doctor the burden of becoming an insurer of a vitally needed, but delicate diagnostic aid where an unfavorable complication may of course occasionally occur even in the presence of the highest degree of care. As a Pennsylvania Court remarked:[77]

> It is necessary for those engaged in the medical profession to constantly employ dangerous agencies, like electricity, radium, surgical instruments, poison, anesthetics, etc., and if prima facie liability attaches for an accident resulting from the use of one, logically, it should from the use of any other, and the practitioner employing such would be practically an insurer of the safety of his patients, which the law declares he is not. The question of liability does not hinge upon the dangerous character of the agency employed, but upon the manner of its use, as to which the presumption of due care is in favor of the practitioner, until overcome by evidence to the contrary.

One has to sympathize with the defendant-doctor! The risk of $250,000 is too great a one for him to be asked to assume. If this is to become the law, it is apparent that the patient and the progress of medical science—not the doctor—are to be the losers. Under the pressure of such odds, the doctors will simply cease to employ such techniques regardless of their benefit to the patient and regardless of the fact that, statistically, serious complications are rare.

One court long ago perceived this and in refusing to apply *res ipsa loquitur* to an untoward result (glaucoma developing subsequent to cataract operation) said:[78] "If the maxim 'res ipsa loquitur,' were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to'."

We are informed that the medical profession is already retrenching along this line, foregoing many useful techniques for fear of court and jury imposing tort liability without fault, through this doctrine of

[76]Not yet officially reported. Defense attorney for the hospital was Joseph Rankin, Esq., Financial Center Building, Oakland 21, California. Defense attorney for the doctor was Howard Hassard, Esq., 111 Sutter Street, San Francisco 4, California. As of February 4, 1957, still awaiting appeal with briefs amicus curiae filed by The American College of Surgeons and the University of California.

[77]124 A. 130, 131 (Pa., 1924).

[78]78 F. 442, 443 (Cir. Ct., S.D. Ohio, W.D., 1897).

res ipsa loquitur. In fact, malpractice litigation is now considered by the medical profession as a serious occupational hazard.[79]

Conclusion

We have examined in some detail the cases of one jurisdiction — namely California—in order to show the recent trend towards liberalization and extension of the doctrine of *res ipsa loquitur* far beyond its original purpose to the dangerous point of a "rule of sympathy" wherein an untoward result is the only proof required to force the defendant-doctor to run the gauntlet of jury speculation, with disastrous consequences approaching financial ruin. This trend appears in other states as well,[80] (although California seems to have gone the farthest in this direction) but fortunately so far has remained a distant minority view. However, inroads are being made[81] upon the sound principles of the law protecting the medical profession from the evils of jury speculation and resultant liability without fault; pressure groups[82] are exerting influence upon courts and legislatures alike to relax and abolish these safeguards of the law. The time has come to exert an organized and effective pressure upon both courts and legislatures in defense of the rule requiring proof of negligence by expert testimony in malpractice cases.

To do so will be to defend not only the medical profession but also the rights of the public, for, if this trend continues, it is the public, as potential patients and beneficiaries of the advancement of medical science, that will suffer. For the medical profession cannot be asked to underwrite the cost of the advancement of medical science at the risk of personal financial ruin. As an English court has said:[82]

> We should be doing a disservice to the community if we imposed liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors work. We must insist on due care for the patient, but we must not condemn as negligence that which is only misadventure. . . .

It is easy to accuse; it is difficult to defend. The safeguard of the law that "he who affirms must prove" and, in malpractice cases "must prove actual negligence by expert testimony," is sound and should be preserved. To do otherwise is to force the medical profession into the role of insurers, a burden which it cannot and will not bear, with the resultant loss of useful techniques and retardation of the progress of medical science. Ultimately, this loss will fall upon the patient himself—who sooner or later may be any one of us.

Caveat

While the medical profession can justly complain that the courts have gone too far in converting the doctrine of *res ipsa loquitur* into a rule of sympathy, thus forcing the defendant-doctor to run the gaunt-

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[79]See article entitled "Malpractice, An Occupational Hazard," by the late Louis J. Regan, M.D. LLB, Journal of The American Medical Association, December 4, 1954.

[80]In 109 S.W. 2d 417, 419 (Tenn.,). Involving injury causing loss of sight of eye during appendectomy) the Supreme Court of Tennessee said:

> ". . . We think a practical administration of justice dictates the application of the doctrine when it appears that a sound and unaffected member of the body is injured or destroyed while the patient is unconscious and under the immediate and exclusive control of the physician. In no other way under usual and ordinary conditions, could the patient obtain redress for such an injury, and it is no hardship upon the defendant to explain as he alone can, how the injury occurred."

And see 7 P. 2d 228 (Montana, 1932) applying res ipsa loquitur against hospital to case of patient jumping from hospital window while delirious.

[81]Massachusetts: St. 1949, Apra. 18, c. 183, Sec. 1, amending G. L. (Ter. Ed.) c. 233 ('A statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, in the discretion of the court. . . . be admissable in actions of contract or tort for malpractice,' etc., 3 days notice before trial to adversary required). See Wigmore on Evidence-Vol. 6—1955 Pocket Supplement to Third Edition, page 4.

[82]In September of 1955, the Conference of Delegates of the State Board of California adopted a resolution calling for the creation of a special committee to study and make recommendations on the matter of the rule requiring expert testimony in medical malpractice cases. The resolution further provided that the Special committee is to consult with "interested organizations"—some of which are dedicatd to abolition of the rule. See Footnote 3.

[82]Wooley and Roe v. Ministry of Health and others (1954) 1 W.L.R. 65. Also see Cassidy v. Ministry of Health (1951) 1 ALL E. R. 574. See also The Medical Legal Journal, part two, volume XXIII (1955) pages 40 through 46.

let of speculation by a lay jury ignorant of "the medical facts of life," there is one aspect of this problem that perhaps bears mention if the medical profession in turn is to understand "the legal facts of life" confronting the courts and the entire legal profession. Occasionally there is a justified malpractice lawsuit. Some doctor was negligent and from that negligence there arose an injury. Such a patient deserves redress. She is entitled, if justice means anything, to her day in court. Yet when she turns to the courts she finds the door to recovery barred by the safeguards of the law, that she who affirms must prove, and in malpractice cases must prove by expert medical testimony. When she reaches for that key, the medical expert, she finds difficulty in persuading any competent doctor to give testimony against a fellow-doctor in any malpractice lawsuit. Deprived of the key, she must batter at the door as best she can hoping to find a way to make it yield. Courts are keenly aware of her dilemma.

Such a dilemma arose on the following rather unusual medical facts;[84]

> Mrs. E. was pregnant with twins. . . . Dr. W. . . . delivered her of one of the children, but did not deliver the other. . . . Immediately after the birth of the first child, some neighbors . . . noticed a 'large mass or knot' in the upper part of her abdomen.
>
> . . . Mrs. E. was brought to . . . Hospital.
>
> She remained at said hospital . . . eleven days. . . . The treatment prescribed and administered consisted of enemas, hot packs on her abdomen, and sedatives. The mass in her abdomen . . . was very noticeable, and her suffering was intense.
>
> Defendants diagnosed her trouble as inflammation, tumor, locked bowels, and gas on the stomach. . . . At the end of that time she was removed to her home, and was told . . . that such treatment should be continued. . . .
>
> She was brought to the . . . Sanitarium . . . decided to be a case requiring immediate surgery, but, on account of her condition, she had to be toned up . . . operation . . . more than a gallon of pus and liquid was drained from her abdomen and the dead fetus was discovered, and removed. It was also shown that the uterus had been ruptured. The fetus was in a badly decomposed condition, and she remained in the hospital for about a week and died . . .
>
> . . . . hospital had an x-ray machine . . . . x-ray would have shown whether the patient was afflicted with a tumor or that there was a fetus in her abdomen; . . . fetus was a female, fully developed and ready for parturition.

The trial court directed a verdict for the defendant-doctors on the plaintiff's failure to produce medical testimony. But this was too much for the reviewing court, which, in reversing and remanding for a new trial, said:[85]

> When it was shown that the use of the x-ray would more than probably have disclosed the nature of the lump, and shown that it was a dead fetus, then there was no necessity for a doctor to say that the failure to use the x-ray was negligence. And we think the jury would have so held.
>
> They insist that this would have been permitting the jury to 'speculate' as to what is or is not good practice and diagnosis, and that only an expert physician could so 'speculate'. If there had been a little more speculation by the doctors with reference to the nature of this lump prior to the time Dr. K. saw the patient, she would possibly have been alive today. Shortly after seeing the patient, he said that an abdominal operation was necessary. It is clear from the record that appellants were handicapped during the trial by the reluctance of physicians to testify with reference to the mistakes of other doctors. It is a matter of common knowledge that they have a rule, known as 'professional courtesy,' which is endemic in the medical profession, and with reference to this case it seems to have become an epidemic in that vicinity and was badly overworked. There were eleven prominent doctors listed on the hospital's stationery, including Dr. W., and from none of them was a sound ever heard. Even Dr. W. who was charged with malpractice, and a woman, failed to chirp. It was shown that Dr. K. was on his way to F.W. while the case was being tried. It

[84]89 S.W. 2d 801, 803 (Texas, 1935).

[85]89 S.W. 2d 801, 820 (Texas, 1935).

[86]16 Nevada State Bar Journal 51 at p. 69. Dean Wm. L. Prosser.

[87]Belli, M. M.: Modern Trials Vol. 3 at p. 1996.

is characteristic of such testimony that it is so uncertain and unsatisfactory that little information may be gained from it. However, Dr. S. is a notable exception, and Drs. C. and K. on account of unfamiliarity with the facts in the case, were not able to give much information. These circumstances account, in some measure, for the failure of plaintiffs to fully develop their case, and require a reversal and remand.

Courts are human beings, swayed by natural sympathy for such a patient. In the face of the medical profession's unwillingness to furnish the key, the courts are finding a way to forge a key of their own to unlatch this door for the rightfully injured patient. That key is the rule of sympathy—an illogical but humanly understandable distortion of the doctrine of *res ipsa loquitur* beyond its original intended purpose, for it dispenses with the necessity of the medical expert. The danger to the medical profession is obvious. It runs the risk of being condemned for problems never rightly understood in cases completely unmerited if the medical truth were only known. As the Dean of the California Law School put it:[10]

"There was one very striking California case which some of you may have noted or heard about . . . which involved a most unusual application of the doctrine of res ipsa. The plaintiff went to a hospital for an operation for appendicitis. When he came out from under the ether, he had suffered a traumatic injury to his shoulder, apparently, so far as anyone can guess, brought about by some kind of strain or blow; and that was all the evidence. He brought an action joining several defendants. He joined the diagnostician who was present at the operation; the surgeon who performed the operation, the anesthetist who gave him the ether, the two nurses who were present and helped, two orderlies who took him back and forth between his hospital room and the operating room, and, of course, the superintendent of the hospital on general principles. No one of those defendants was in exclusive control of the situation. The court held that each of them had the burden of proving that he was not negligent. The court said that anyone who entrusted himself under those circumstances to the care of the medical profession for an operation in which his health, safety, or even his life might be involved, was entitled either to an explanation of what had happened or the payment of his damages . . .

The other side of the picture is that res ipsa loquitur has been used at least in a fairly small number of cases to do something more than permit an inference from circumstantial evidence. It has been used, as it was used in that . . . case, to place upon the defendant the responsibility of producing evidence which is within his control and to compel that defendant to come forward with what he knows, or pay. The result in . . . does not make you altogether happy. All of those people were certainly not negligent. Some were entirely innocent persons who were not at fault, or who probably did not know what happened, yet had the verdict go against them. And yet when I consider the difficulties that I have sometimes encountered when representing the plaintiff in inducing any member of the medical profession to come forward with testimony in a malpractice case, I am not sure I am altogether dissatisfied with that result. I think in the next malpractice case in California there is going to be some testimony put in on the part of the defendant and that means that the plaintiff, at least, will have some chance of cross-examination, which is perhaps all he can ever ask for.

As was said by a California practicing attorney:[11]

"But it should be realized that res ipsa here is, in effect, two-fold: substituting not only for proof, but for the necessary expert evidence *usually impossible to obtain* and not required in the non-malpractice case."

The medical profession cannot have its cake and eat it too. This is a live and let live world. Justice is a two-way street. If the medical profession wishes to retain the safeguards of the law requiring proof of malpractice by medical testimony, it must make available to rightfully injured patients such medical proof in turn. Whatever the medical truth, patients are entitled to it too. For if the door is not unlocked by the one key, it most assuredly will be by the other. Perhaps this is a problem the medical profession will have

to answer for itself. From the medico-legal point of view, in the face of astronomically rising *res ipsa loquitur* verdicts against defendant-doctors without proof of fault, some sort of answer would seem to be a necessity; from the long range public relations point of view, it would seem to be a virtue.

Appendix

Note.—The following table represents a survey of medical malpractice cases wherein *res ipsa loquitur* was either applied or considered but rejected by the court from 1941 through 1955 inclusive, broken down into three five-year periods. The table is as inclusive as a reasonable search permits but does not pretend to be all-inclusive.

(See table next page)

63 cases 15 Jur.

TABLE 1.—*Recent Trend*

	1941-1945		1946-1950		1951-1955	
	Applied	Rejected	Applied	Rejected	Applied	Rejected
Alabama		1		1		1
Arizona					2	
Arkansas		1		1		
California	1	2	3		4	8
Colorado		1				
Connecticut						
Delaware						
Florida						
Georgia		1				
Illinois						
Indiana					1	
Idaho						
Iowa		1	1			
Kansas					1	
Kentucky		1		1		
Louisiana					1	
Maine						
Maryland						
Massachusetts		1				
Michigan						
Minnesota		2				
Mississippi				1		
Missouri						
Montana						
Nebraska						
Nevada						
New Hampshire						
New Jersey						
New Mexico						
New York						
North Carolina	1					3
North Dakota						2
Ohio			1	1		
Oklahoma		2				
Oregon				1		
Pennsylvania						
Rhode Island						
South Carolina						
South Dakota		1				
Tennessee			2	1		
Texas					1	
Utah						
Vermont						
Virginia			1			
Washington			1			2
West Virginia						
Wisconsin		1				
Wyoming		1				
Federal				1		2
Totals	2	16	9	8	10	18

Comment.—The number of cases wherein *res ipsa loquitur* has either been urged upon the court by patients' attorneys but rejected by the court or been applied by the court has been steadily rising over the past 15 years.

Medical Analysis of Res Ipsa Loquitur

Note.—The following tables represent a survey of reported medical malpractice cases wherein the doctrine of *res ipsa loquitur* has either been applied or considered but rejected by the court. The list is as inclusive as a reasonable search permits but does not pretend to be all-inclusive. To aid the doctor in locating his specialty, the cases are arranged by the medical specialty predominantly involved and by states under each medical specialty heading, so that the doctor can also easily locate his own jurisdiction.

TABLE 2.

Specialty	"Res Ispa Loquitur" Applied	"Res Ispa Loquitur" Rejected	Total
Anesthesia	1	5	6
Diagnosis	0	3	3
General practice	4	4	8
Obstetrics	3	1	4
Ophthalmology	0	1	1
Orthopedics (nonsurgical)	3	8	11
Pediatrics	1	0	1
Psychiatry	0	2	2
Surgery	32	29	61
X-ray	5	8	13
Miscellaneous	1	0	1
Totals	50	61	111

Comment.—It is interesting to note that out of 111 *res ipsa loquitur* involved cases, 66 or over 60% involved unconscious patients, and that in 50% of these 66 *res ipsa loquitur* was applied. Furthermore, by far the largest single medical group of cases involving the application of *res ipsa loquitur* came from the operating room where the patient is unconscious and therefore a fit subject for application of the rule of sympathy. When one bears in mind (1) that it is also the operating room that is most apt to yield an untoward result even in the face of the highest degree of care and (2) that the lay juror knows least about the complicated medical procedures there involved, these statistics become alarming and the injustice of the rule of sympathy apparent.

Cases

1. ANESTHESIA

California
Res ipsa applied
188 P. 2d 12 (Calif. 1947)

Where there is injury when explosion occurs within oral or nasal passages during removal of wart from nose with hot electric needle while under non-explosive anesthetic and before administration of ether, an explosive anesthetic, res ipsa applies against doctor and hospital.
291 P. 2d 915 (Calif. 1955)

Res ipsa applies only where laymen would know injury would not ordinarily occur if due care was used. Here temporary pararlysis followed as result of spinal anesthetic given prior to childbirth.

Missouri
Res ipsa rejected
253 S.W. 156 (Mo. 1923)

Res ipsa does not apply where machine used to administer anesthetic explodes.

Montana
Res ipsa rejected
194 P. 488 (Montana 1920)

Res ipsa does not apply to malpractice case involving administration of anesthetic to intoxicated person causing death.

Texas
Res ipsa rejected
258 S.W. 2d 182 (Texas 1953)

Negligence in malpractice action must be proved by expert testimony. No proof that alleged negligence in administering spinal anesthetic resulted in paralysis of legs.

Federal
Res ipsa rejected
192 Fed. 2d 181 (C A 3 1951)

In action against surgeon and anesthetist for damages alleged to have been caused by nerve damage due to spinal anesthesia. Res ipsa does not apply because injury could have occurred though proper care was used and case is based on lack of skill in diagnosis, method or manner of treatment.

II. DIAGNOSIS

Alabama
Res ipsa rejected
13 So. 2d 48 (Ala. 1943)

No res ipsa as to diagnosis and treatment by physician. Here death due to

coronary occlusion following treatment of contusion of arm.

California

Res ipsa rejected

234 P. 2d 34 (Calif. 1951)

Res ipsa will not be applied where diagnostic problem not within common knowledge of laymen. Patient died due to blood clot after treatment of fractured skull received in automobile accident.

Ohio

Res ipsa rejected

113 N.E. 2d 373 (C A Ohio 1953)

Plaintiff claimed damage due to incorrect diagnoses and X-ray therapy. Court held res ipsa does not apply to cases of diagnosis and scientific treatment.

III. GENERAL PRACTICE

California

Res ipsa applied

284 P 2d 133 (Calif. 1955)

Res ipsa applies to injury resulting from injection of drug into arm. Within knowledge of laymen, device in control of defendant.

241 P. 2d 684 (Calif. 1953)

Res ipsa applies to scars received due to warm compress treatment of leg resulting in burns.

192 P. 2d 771 (Calif. 1948)

Where doctor used silver nitrate pencil to mark veins to be removed and serious burns resulted, res ipsa is applicable against doctor. Doctor got pencil from hospital nurse who asked him if that was what he wanted and he said yes.

Florida

Res ipsa rejected

198 So. 208 (Fla. 1940)

Plaintiff claimed heat application of defendant in treating phlebitis caused ulcers on leg. Held: Res ipsa not applicable.

North Carolina

Res ipsa rejected

79 S.E. 2d 493 (N.C. 1954)

Res ipsa not applicable to alleged arsenic poisoning from medicine. No evidence that treatment not approved and acceptable.

1 S.E. 2d 889 (N.C. 1939)

Res ipsa not applicable in suit for injuries as result of unexpected and unfavorable result of doctor's treatment in using local anesthetic in circumcision allegedly containing caustic chemicals.

North Dakota

Res ipsa rejected

216 N.W. 569 (N.D. 1927)

Res ipsa does not apply where leg is lost as result of treatment of injured foot with tourniquet on leg.

Rhode Island

Res ipsa applied

83 A. 82 (R.I. 1912)

Where drain was left in incision in breast and allowed to remain after wound healed, defendant must come forth and show it was not due to negligence.

IV. OBSTETRICS

California

Res ipsa applied

302 P. 2d 86 (Cal. D.C. of App. 1956)

Trial court applied res ipsa loquitur to sponges left in uterus following delivery, but verdict of jury was for defendant. District Court of Appeals affirmed the verdict.

Tennessee

Res ipsa applied

230 S.W. 2d 659 (Tenn. 1950)

Res ipsa is applicable when patient, unconscious after birth of child and in exclusive control of hospital, received serious injury, including fracture of humerus in left shoulder, and compression of eighth thoracic vertebra. But where all facts are brought out and nothing left to inference, it cannot apply.

Utah

Res ipsa rejected

83 P. 2d 1021 (Utah 1938)

Res ipsa is not applicable to death of mother following childbirth due to alleged negligence of physician.

Virginia

Res ipsa applied

43 S.E. 2d 882 (Va. 1947)

Res ipsa applies where baby was burned between time it left delivery room and time of discovery of burn the next day, during which time it was in possession of hospital and hospital didn't know how it happened.

V. OPHTHALMOLOGY

Massachusetts

Res ipsa rejected

187 N.E. 829 (Mass. 1933)

Res ipsa does not apply when ulcer developed after doctor put unidentified liquid in eye.

VI. ORTHOPEDICS

Alabama
Res ipsa rejected
61 So. 2d 690 (Ala. 1952)

Plaintiff broke her leg. Leg was set by defendant. She was dissatisfied with defendant and another doctor reset it three weeks later. Knee cap had to be removed later. Held: Res ipsa does not apply just because treatment had an unsuccessful result.

Arkansas
Res ipsa rejected
119 S.W. 2d 529 (Ark. 1938)

Res ipsa not applicable to medicine and surgery. Here there was an infection resulting from tight cast on arm.

California
Res ipsa rejected
149 P. 2d 69 (Calif. 1944)

Res ipsa does not apply where lamp globe explodes during treatment with big infra-red heating lamp.
133 P. 2d 425 (Calif. 1943)

Res ipsa does not apply to malpractice action where burns resulted from diathermy treatment for sprained ankle, since not within common knowledge of laymen.

Iowa
Res ipsa rejected
297 N.W. 301 (Ia. 1941)

Res ipsa does not apply where defendant treated for broken hip and leg and failed to heal.

Kentucky
Res ipsa rejected
210 S.W. 2d 946 (Ky. 1948)

Res ipsa does not apply to malpractice cases. Plaintiff must prove case by expert testimony unless within common knowledge of laymen. Doctor failed to X-ray leg after reducing a fracture.

Minnesota
Res ipsa rejected
276 N.W. 801 (Minn. 1937)

Res ipsa does not apply where pressure sore on foot results from Whitman cast treatment of fractured femur near hip socket.

North Carolina
Res ipsa applied
197 S.E. 701 (N.C. 1938)

Res ipsa applies where patient went to hospital with fractured fibula and defendant set the bone, did not see patient again for seven days during which time leg swelled, abscessed and burst. Applies in cases other than foreign substances during operations.

Ohio
Res ipsa applied
94 N.E. 2d 706 (Ohio 1950)

Expert testimony not always necessary in malpractice, evidence may warrant inference of negligence as where physician failed to properly reduce the fracture and permitted it to become infected and otherwise failed to take proper care of it during the period of convalescence.
Res ipsa rejected
103 N.E. 2d 13 (Ohio 1951)

Plaintiff broke hip bone. Went to hospital. Defendant called in by family doctor to set bone. Performed operation of hip pinning. Plaintiff burned by chemicals. Directed verdict for defendant affirmed. No control of chemical by defendant.

Tennessee
Res ipsa rejected
145 S.W. 2d 559 (Tenn. 1940)

Res ipsa does not apply where failure may have been caused by other than lack of care. Here leg bones did not set properly after treatment of fracture.

Washington
Res ipsa applied
221 P. 2d 537 (Wash. 1950)

Res ipsa applies where common knowledge of laymen would indicate that injury would not have occurred but for negligence Here radius of left forearm was set by defendant and bones were not aligned so open reduction later necessary.

VII. PEDIATRICS

Arizona
Res ipsa applied
239 P. 2d 591 (Ariz. 1952)

Though res ipsa not ordinarily applicable, where vaporizer used in treating baby's bronchial ailment was within exclusive control of defendant and facial burns resulted not due to baby's actions, and would not ordinarily occur in absence of negligence, res ipsa applies.

VIII. PSYCHIATRY

California
Res ipsa rejected
254 P. 2d 520 (Calif. 1953)

Res ipsa not applicable where mentally

incompetent adult sustains fracture during electroshock treatments.

Tennessee
Res ipsa rejected
192 S.W. 2d 992 (Tenn. 1946)
Res ipsa does not apply where hip was broken by electric shock treatment.

IX. SURGERY

Alabama
Res ipsa applied
95 So. 167 (Ala. 1923)
Where needle is left in body after appendectomy, burden passes to defendant to show ordinary care.
Res ipsa rejected.
25 S. 2d 264 (Ala. 1946)
No res ipsa in malpractice, plaintiff must show negligence. Plaintiff was treated for acute retention of urine due to stricture of urethra. A steel instrument used in treatment punctured the bladder.
147 S. 608 (Ala. 1933)
Res ipsa does not apply to death following tonsillectomy due to heart failure after anesthetic.

Arizona
Res ipsa applied
230 P. 2d 213 (Ariz. 1951)
Where plaintiff was operated on by defendant for extra-uterine pregnancy and cloth sack was found in area later res ipsa will apply.

California.
Res ipsa applied
64 P. 2d 409 (Calif. 1936)
Where sponge was left in abdomen after gall bladder operation, res ipsa will be applied.

260 P. 2d 997 (Calif. 1953)
Res ipsa applies against all surgeons and hospital where needle is left in abdomen after operation to remove part of stomach. Principal and assistant surgeon by resident surgeon.
277 P. 134 (Calif. 1929)
Presumption of negligence arises from loss of tooth after adjustment of gag after administration of anesthetic for tonsil operation.
223 P. 2d 471 (Calif. 1950)
Res ipsa is applicable to surgeons and hospital where death occurs during tonsillectomy due to hemorrhage and accumulation of blood in lungs. Does not ordinarily occur and is within knowledge of laymen.
279 P. 2d 184 (Calif. 1955)
Where patient is in semi-conscious state following "major" operation and burn on stomach is discovered three days later, res ipsa applies against doctors, nurse and hospital. Test is right of control.
154 P. 2d 687 (Calif. 1944)
Where plaintiff had appendectomy and while unconscious received injury to arm res ipsa applies against doctors and nurses. Res ipsa rejected.
99 P.2d 1044 (Calif. 1940)
Res ipsa is not applicable to blindness resulting from operation on eye after magnet failed to remove foreign body from eye.
231 P. 2d 108 (Calif. 1951)
Where operation for removal of varicose veins from testicle was performed and atrophy of testicle resulted, it was too complex for laymen so res ipsa does not apply.
257 P. 2d 756 (Calif. 1953)
Res ipsa not applicable in total hysterectomy operation since it is too complex for layman's inferences.
88 P. 2d 695 (Calif. 1939)
Res ipsa not applicable to operation to correct knee resulting in "foot drop". Rev.'d. application of res ipsa in 80 P. 2d 96.
281 P. 2d 272 (Calif. 1955)
Res ipsa applies only where common knowledge shows injury would not have occurred but for negligence. Here a facial infection followed plastic surgery.

Connecticut.
Res ipsa applied
138 A. 153 (Conn. 1927)
Where instrument broke during operation for removal of spur from nostril and defendant left piece in nose, expert testimony is not necessary to establish negligence.

Florida
Res ipsa applied
157 So. 328 (Fla. 1934)
It is negligence per se to leave sponge in abdomen incision after caesarian operation.
89 So. 2d 13 (Fla. 1956)
The Court refused to apply res ipsa loquitur to defendant engaged in removing moles from plaintiff's face by use of an electrically heated knife, which became dislocated and fell on plaintiff's neck burning it, stating that res ipsa loquitur does not apply since the injury may be due to

negligence of the manufacturer of the knife.

Idaho
Res ipsa applied
26 P. 2d 796 (Idaho 1933)

Where needle is broken off and left in chest after lung tapping operation for pneumonia expert testimony is not necessary to establish malpractice.

Indiana
Res ipsa applied
183 N.E. 312 (Ind. 1932)

Where sponge is left in abdomen after operation for removal of tumor burden shifts to defendant to show absence of negligence.
106 N.E. 2d 108 (C.A. Ind. 1952)

Defendant performed operation to correct incisional hernia. Bowel of plaintiff cut during operation. Res ipsa should apply as unusual injury to healthy, unaffected organs located within field of operation.

Rev'd by 110 N.E. 2d 337—Sup. Ct. Ind. which held res ipsa loquitur did not apply to the situation.

Iowa
Res ipsa applied
154 N.W. 923 (Iowa 1915)

Where tongue is cut during operation to remove adenoids, that evidence is enough to send the case to the jury.
43 N.W. 2d 121 (Iowa 1950)

Where plaintiff alleges malpractice due to physician's operation on plaintiff's leg allegedly causing gangrene and requiring amputation res ipsa applies on general negligence where there is evidence that defendant ligated an artery rather than a vein.

Kentucky
Res ipsa applied
25 S.W. 2d 33 (Ky. 1930)

Res ipsa is applicable where burns are received from hot water bottle while plaintiff was under anesthetic for operation for appendicitis.

Res ipsa rejected
94 S.W. 2d 626 (Ky. 1936)

Res ipsa does not apply to malpractice, hence failure to cure does not create a presumption of negligence. Doctor failed to discover that peg used in hip pinning operation had moved into bladder.
160 S.W. 2d 6 (Ky. 1942)

Res ipsa not applicable in malpractice case. A needle was left in foot after an operation to repair an artery.

Louisiana
Res ipsa applied
61 So. 2d 901 (La. 1952)

Plaintiff claims defendant's oral surgeon and anesthetist caused tooth to drop into lung during extractions. Held, res ipsa applies though there are two defendants since something occurred that was unusual in such treatment but found that evidence established that both defendants had done all that reasonably careful practitioners, skilled in their respective professions, could have done, and that consequently there was no liability in either.

Maryland
Res ipsa rejected
124 A. 2d 265 (Maryland Court of Appeals, 1956)

Plaintiff alleged that defendant negligently severed facial nerve during mastoidectomy performed eleven years before, with paralysis appearing day after operation. The Court of Appeals affirmed the judgment for defendant holding that res ipsa loquitur did not apply in Maryland and plaintiff did not establish a case by expert testimony.

Massachusetts
Res ipsa rejected
159 N.E. 451 (Mass. 1928)

Res ipsa does not apply where sponge is left in after appendectomy is complete.

Michigan
Res ipsa applied
247 N.W. 911 (Mich. 1933)

Where needle is left in incision after appendectomy, it is negligence in absence of explanation of surgeon.

Minnesota
Res ipsa rejected
243 N.W. 67 (Minn. 1932)

Res ipsa does not apply to death following tonsil operation.
300 N.W. 791 (Minn. 1941)

No res ipsa where failures occur regardless of careful work. Clamps used in circumision resulted in scars.
19 N.W. 2d 426 (Minn. 1945)

Res ipsa does not apply where burns might have been caused by other than hot water bottles during operation to repair tear in bowel.
268 N.W. 670 (Minn. 1936)

Res ipsa does not apply to malpractice. Expert testimony is necessary. An infec-

tion set in following a gall bladder operation.

Mississippi
27 So. 2d 889 (Miss. 1946)
Where only complaint is that child died shortly after tonsillectomy, res ipsa does not apply. No expert testimony.
Missouri
Res ipsa applied
99 S.W. 453 (Mo. 1907)
Res ipsa applies where plaintiff burned by nurses with hot water bottles while under anesthetic.
78 S.W. 2d 75 (Mo. 1934)
Where gauze was left in body after gall bladder operation, proof that it was left there is prima facie case.

Montana
Res ipsa applied
33 P. 2d 535 (Mont. 1934)
Res ipsa applies where there is burn on chest while unconscious for operation to remove appendix and fibroid tumor.

New Jersey
Res ipsa applied
174 A. 896 (N.J. 1934)
Where sponge is left in abdomen after incision for "important abdominal operation" is closed, case is for jury.
Res ipsa rejected
95 A. 995 (N.J. 1915)
Burden does not shift to defendant when plaintiff shows that gauze was left in abdomen after "surgical" operation.

New York
Res ipsa applied
237 N.Y. S. 611 (1929)
Presence of gauze pack in abdomen after operation to repair ruptured fallopian tube due to extrauterine pregnancy may give rise to inference of negligence. But, when defendant's expert witness stated that proper and approved methods were used in the operation, the possible inference of negligence because the gauze pack had been left in the abdomen was destroyed. Judgment for plaintiff was reversed and a new trial granted.
Res ipsa rejected
292 N.Y.S. 392 (1936)

No res ipsa against surgeon where hospital shared control. A tooth was found to be knocked out 24 hours after operation to remove adenoids.

North Carolina
Res ipsa applied
13 S.E. 2d 242 (N.C. 1941)
Res ipsa is applicable where two physicians leave gauze sponge in body after leg operation. Here proper inferences may be drawn by ordinary men.
166 S.E. 285 (N.C. 1932)
Res ipsa applies where injury is received during operation for fallen womb and while patient is unconscious.
Res ipsa rejected
88 S.E. 2d 762 (N.C. 1955)
Where defendant unsuccessfully operated to remove piece of metal and patient lost arm, res ipsa does not apply.

North Dakota
Res ipsa rejected
231 N.W. 278 (N.D. 1930)
Expert testimony is necessary to establish negligence where paralysis of face occurs after mastoid operation.

Ohio
Res ipsa applied
164 N.E. 518 (Ohio 1928)
Proof that sponge was left in abdomen after gall bladder operation is prima facie case.
Res ipsa rejected
88 N.E. 2d 76 (Ohio 1949)
Malpractice is a question for experts and can be established only by their testimony. Here bladder was cut during hysterectomy operation.

Pennsylvania
Res ipsa applied
86 A. 1007 (Pa. 1913)
Where proof shows gauze was left in incision after operation to relieve tubercular peritonitis, burden shifts to defendant to show that he was not negligent.

Tennessee
Res ipsa applied
205 S.W. 2d 759 (Tenn. 1947)
Res ipsa will apply if needle was put in body during appendectomy and wound closed without removing it, but will not serve to prove that needle went in during operation.
109 S.W. 2d 417 (Tenn. 1937)
Res ipsa will apply when sound and unaffected member eye is injured while patient unconscious and under exclusive control of surgeon for appendectomy but as it was not proven that plaintiff was injured while under defendant's control,

court found for defendant.
Res ipsa rejected
126 S.W. 2d 381 (Tenn. 1938)
Res ipsa will not apply where injury could have occurred regardless of care. Here facial paralysis followed mastoid operation.

Texas
Res ipsa applied
142 S.W. 2d 238 (Texas 1940)
Failure to remove a sponge after closing incision in "surgical operation" is negligence as matter of law.

Washington
Res ipsa applied
278 Pac. 181 (Wash. 1929)
It is negligence as matter of law to leave sponge in incision after bone transplant operation to immobilize injured back.
Res ipsa rejected
284 P. 803 (Wash. 1930)
Res ipsa is not applicable to bladder leak incurred after operation for removal of uterus.
258 P. 2d 472 (Wash. 1953)
Res ipsa does not apply to throat operation and patient's loss of voice since beyond knowledge of laymen.
266 P. 2d 792 (Wash. 1954)
Res ipsa will not be applied against doctor and hospital supply corporation where plaintiff suffered shocks from electric-surgical unit used in operation for prostatic resection.

Wyoming
Res ipsa applied
17 P. 2d 659 (Wyo. 1933)
Question as to whether sponge was left in body after appendectomy is for jury.

Federal
Res ipsa rejected
78 Fed. 442 (Cr. Ct. S.D. Ohio W.D. 1897)
Expert testimony is necessary to support a malpractice case for loss of eye after operation to cure "certain malady of eye."
Res ipsa applied
77 F. Supp. 706 (D.C. Md. 1948)
Court found that towel was left in body and by using res ipsa loquitur it inferred that there must have been negligence in leaving towel in body in the absence of any convincing evidence of the lack of negligence in doing so. Judgment was for defendant on grounds Federal Tort Claims Act did not cover case.

X. X-RAY

Arkansas
Res ipsa rejected
186 S.W. 2d 779 (Ark. 1945)
Res ipsa does not apply to practice of medicine and surgery or use of X-ray. Here burn resulted from use of X-ray to locate needle in foot.

California
Res ipsa rejected
227 P. 2d 473 (Calif. 1951)
Res ipsa not applicable where condition may have been caused by forces other than negligent X-ray treatment for papillomae.
247 P. 2d 21 (Calif. 1952)
Res ipsa does not apply to burning by X-ray for treatment of carcinoma. Too complex for laymen.

Indiana
Res ipsa rejected
157 N.E. 456 (Ind. 1927)
Res ipsa does not apply to treatment by X-ray expert for eczema causing burns.

Iowa
Res ipsa applied
103 N.W. 360 (Iowa 1905)
Burns received from X-ray used in treatment of appendicitis are in themselves evidence of negligence.
Res ipsa rejected
232 N.W. 821 (Iowa 1930)
Res ipsa does not apply to burn resulting from X-ray treatment of ring-worm.

Kansas
Res ipsa applies
258 P. 2d 332 (Kan. 1953)
Res ipsa applies where defendant examined plaintiff's wart, advised its removal, assumed duty to remove it in proper manner, had exclusive control of X-ray and instrumentalities and yet plaintiff suffered severe burns on head and neck.

Minnesota
Res ipsa applied
136 N.W. 741 (Minn. 1912)
Res ipsa applies to burns received from X-ray pictures taken of plaintiff.

North Carolina
Res ipsa rejected
76 S.E. 2d 461 (N.C. 1953)
Res ipsa does not apply to X-ray treatment since injury could have occurred if proper care was used. Lesion on heel resulted from X-ray treatment of wart.

Pennsylvania
Res ipsa applied
12 A 2d 579 (Pa. 1940)

Inference of negligence may result where patient is burned as result of X-ray treatment since it does not normally happen. Not res ipsa exactly but a kindred rule. Injury due to a want of care.

Res ipsa rejected
124 A. 130 (Pa. 1924)

Mere happening of accident from use of X-ray machine does not create presumption of negligence. Burn followed X-ray pictures of teeth.

Tennessee
Res ipsa applied
7 S.W. 2d 808 (Tenn. 1928)

Res ipsa applies to burn caused by last X-ray treatment of 161 scattered over 6 years.

Texas
Res ipsa rejected
72 S.W. 2d 923 (Texas 1934)

Res ipsa does not apply to burns caused by X-ray treatment for favus.

XI. MISCELLANEOUS

Montana
Res ipsa applied
7 P. 2d 228 (Mont. 1932)

Res ipsa applies where patient jumped from hospital window while delirious.